Supreme Court, U.S.
FILED
01728 MAY 22 2002
OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

ELLETT BROTHERS, INC.,
Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, INC.,
ST. PAUL MERCURY INSURANCE COMPANY,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

THORNWELL F. SOWELL III
Counsel of Record
SOWELL GRAY STEPP
& LAFFITTE, L.L.C.
1310 GADSDEN STREET
COLUMBIA, SC 29201
(803) 929-1400

AMY HOWE
GOLDSTEIN & HOWE, P.C.
4607 ASBURY PLACE, N.W.
WASHINGTON, D.C. 20016
(202) 237-7543

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

55 pg

QUESTION PRESENTED

Did the Court of Appeals err when, contrary to the longstanding precedent of this Court, the practice of other courts of appeals, and constitutional principles of federalism, it made no effort to discern and apply state law in a diversity case, but instead relied on a "default rule" that it had allegedly established in an earlier case?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Ellett Brothers, Inc. was the appellant below.

The respondents in this Court, appellees below, are: United States Fidelity and Guaranty Company, Fidelity and Guaranty Insurance Underwriters, Inc. and St. Paul Mercury Insurance Company.

Other entities named in the court of appeals' caption, but who neither participated in the court of appeals nor are respondents here, are International Insurance Company, RLI Insurance Company, Mount Hawley Insurance Company, United National Insurance Company, Defendants; and American Insurance Association, National Shooting Sports Foundation and National Association of Independent Insurers, Amici Curiae.

RULE 29.6 STATEMENT

No parent corporation exists, and no publicly held company owns 10% or more of the stock of Ellett Brothers, Inc.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding Below ii

Rule 29.6 Statement ii

Opinions Below 1

Jurisdiction 1

Statute Involved 1

Statement of the Case 2

Reasons for Granting the Writ 5

I. This is a diversity case initiated in state court and removed to federal court, and therefore the federal court is required to analyze and apply state substantive law 5

II. The Fourth Circuit's opinion fails to discern and apply South Carolina law and therefore creates federal common law in violation of the constitutional principles set forth in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) 7

(1) The Court of Appeals has no authority to create any federal common law 8

(2) The Fourth Circuit's creation of its own common law rule of contract interpretation conflicts with every other United States Circuit Court of Appeals 9

(3) The respondents have been allowed to illegally forum-shop in violation of the *Erie* doctrine 11

III. Neither the opinion below nor the opinion in *Cincinnati Insurance Company v. Milliken* represents South Carolina law 12

(1) *Milliken* has been conclusively rejected, and furthermore, it disregards South Carolina law 13

(2) The Fourth Circuit's opinion directly contradicts South Carolina law 19

(3) The South Carolina Court of Appeals' decision in *Braswell v. Faircloth* rejects *Milliken* 21

IV. In sum, the Fourth Circuit has turned the *Erie* doctrine on its head 22

Conclusion 23

TABLE OF AUTHORITIES

CASES

Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp.,
948 F.2d 1507 (9th Cir. 1991) 17, 18

AIU Ins. Co. v. Superior Court,
799 P.2d 1253 (Cal. 1990) 16

Allstate Insurance Co. v. Menards, Inc.,
285 F.3d 630 (7th Cir. 2002) 5, 10, 23

Anderson Dev. Co. v. Travelers Indem. Co.,
49 F.3d 1128 (6th Cir.1995) 18

Avondale Indus. Inc. v. Travelers Indem. Co.,
887 F.2d 1200 (2nd Cir.1989) 18

Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.,
625 A.2d 1021 (Md.1993) 13, 14, 15, 18, 20

Bituminous Cas. Corp. v. Vacuum Tanks, Inc.,
75 F.3d 1048 (5th Cir.1996) 18

Boeing Co. v. Aetna Cas. & Sur. Co.,
784 P.2d 507 (Wash. 1990) 15, 20

Braswell v. Faircloth,
387 S.E.2d 707 (S.C. Ct. App. 1989) 4, 6, 7, 21, 22

C.D. Spangler v. Indus. Crankshaft and Engineering Co., Inc.,
388 S.E.2d 557 (N.C. 1990) 16, 19

Cincinnati Insurance Co. v. Milliken & Co.,
857 F.2d 979 (4th Cir. 1988) . . . . . Passim

Coffey v. Foamex L.P., 2 F.3d 157 (6th Cir. 1993) . . . 9

Commissioner of Internal Revenue v. Bosch,
387 U.S. 456 (1967) 22

Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co., Inc.,
842 F.2d 977 (8th Cir. 1988) . . . 3, 13, 15, 17, 18

Delta Air Lines, Inc. v. McDonnell Douglas Corp.,
503 F.2d 239 (5th Cir. 1974) 9

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) . . . . . Passim

Farmland Indus. Inc. v. Republic Ins. Co.,
941 S.W.2d 505 (Mo. 1997) 13, 17, 18

Forsyth v. Cessna Aircraft Co.,
520 F.2d 608 (9th Cir. 1975) 10

Gerrish Corp. v. Universal Underwriters Ins. Co.,
947 F.2d 1023 (2nd Cir.1991) . . . . . .

Gooding v. Wilson, 405 U.S. 518 (1972) 4

Greenville County v. Insurance Reserve Fund,
443 S.E.2d 552 (S.C. 1994) 15

Hays v. Mobil Oil Corp., 930 F.2d 96 (1st Cir.1991) . . 18

Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.,
944 F.2d 940 (D.C.Cir.1991) 18

Lindsay Mfg. Co. v. Hartford Acc. & Indem. Co.,
118 F.3d 1263 (8th Cir. 1997) 17

Macon-Bibb County Industrial Authority v. Nord Bitumi, U.S., Inc.,
77 F.3d 417 (11th Cir. 1996) 10

Maryland Casualty Co. v. Armco, Inc.,
822 F.2d 1348 (4th Cir. 1987) . . . . . Passim

McCracken v. Gov't Employees Ins. Co.,
325 S.E.2d 62 (S.C. 1985) 19

Metro Wastewater Recl. Dist. v. Continental Cas. Co.,
834 F.Supp. 1254 (D.Col. 1993) 16

National Indem. Co. v. United States Pollution Control, Inc.,
717 F.Supp. 765 (W.D.Okla. 1989) 16

New Castle County v. Hartford Accident & Indem. Co.,
933 F.2d 1162 (3rd Cir.1991)
rev'd on other grounds,
New Castle County v. Hartford Accident & Indem. Co.,
970 F.2d 1267 (3rd Cir. 1992) 18

North Am. Specialty Ins. Co. v. Lapalme,
258 F.3d 35 (1st Cir. 2001) 9

Oriental Trading Co. v. Firetti,
236 F.3d 938 (8th Cir. 2001) 10

Poole v. Kelly, 854 F.2d 760 (D.C. Cir. 1992) 10

Port of Portland v. Water Quality Ins. Syndicate,
796 F.2d 1188 (9th Cir.1986) 18

Rosenfield v. Basquait, 78 F.3d 84 (2d Cir. 1996) 9

Salve Regina College v. Matthew, 499 U.S. 225 (1991) . 9

Sloan Construction Co. v. Central Nat'l Ins. Co.,
236 S.E.2d 818 (S.C. 1977) 18

South Carolina State Budget and Control Board v. Prince,
403 S.E.2d 643 (S.C. 1991) 7, 19, 20

State Farm Mut. Auto. Ins. Co. v. Pate,
275 F.3d 666 (7th Cir. 2001) 9

Stauth v. National Union Fire Ins. Co. of Pittsburgh,
236 F.3d 1260 (10th Cir. 2001) 10

Swift v. Tyson, 41 U.S. 1 (1842) 11

Truck Ins. Exchange v. Marks Rentals, Inc.,
418 A.2d 1187 (Md. 1980) 14

Van Buskirk v. Carey Canadian Mines, Ltd.,
760 F.2d 481 (3d Cir. 1985) 9

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746,
27 L.Ed. 2d 669 (1971) 5

STATUTES

28 U.S.C. § 1254(1) 1

OTHER AUTHORITY

Nancy W. Monts, INSURANCE COVERAGE FOR SUPERFUND CLAIMS: ARE RESPONSE COSTS RECOVERABLE DAMAGES?, 41 S.C.L.R. 871, 879 (1990) 21

Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va.L.Rev. 1671 (1992) 12

19 Wright, Miller and Cooper, *Federal Practice and Procedure* § 4503 at 24 (1996) 8

PETITION FOR WRIT OF CERTIORARI

Petitioner Ellett Brothers, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits is reported at 275 F.3d 384 (Pet. App. 4a- 16a). The order of the Court of Appeals denying petitioner's motion for certification of questions of law (Pet. App. 17a-19a) is unreported. The orders of the United States District Court for the District of South Carolina, Columbia Division, denying petitioner's motion for certification of question of law and granting respondents' motion for summary judgment (Pet. App. 25a; 20a-24a) are unreported. The decision of the Court of Appeals denying the petition for rehearing and rehearing *en banc* (Pet. App. 1a-3a) is unreported.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was issued on December 28, 2001. A timely petition for rehearing and rehearing *en banc* was denied by that court on January 23, 2002. Chief Justice Rehnquist subsequently extended the time to file this petition to and including May 23, 2002. *See* App. No. 01-A764. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

No relevant constitutional or statutory provisions apply.

STATEMENT OF THE CASE

Petitioner Ellett Brothers is a South Carolina gun distributor insured under commercial general liability insurance policies written by the insurance company respondents. When sued by several municipalities in California and the NAACP in New York for the wrongful distribution of handguns, petitioner sought a defense from the insurance companies.[1] When the insurance companies denied a defense, Ellett Brothers brought an action in state court in South Carolina, seeking a declaratory judgment that respondents were obligated to defend the lawsuits and indemnify petitioner. The case was removed to federal court in South Carolina, which is required to apply South Carolina substantive law because the insurance policies either were issued in South Carolina or insured a risk located in South Carolina.

---

[1] The insurance policies state: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The policies define several pertinent terms, but the term "damages" is not defined in any of the policies.

The underlying lawsuits allege that Ellett Brothers' negligent marketing and distribution of firearms have caused injuries, death, and other damages to people and property. As a result of these injuries and deaths, the municipal lawsuits seek injunctive and declaratory relief, pre-judgment and post-judgment interest, civil penalties, restitution and disgorgement, costs and attorneys' fees, and "such other relief as the Court deems equitable and just." The lawsuit by the NAACP seeks injunctive and declaratory relief, the payment by Ellett Brothers into a "fund for education, supervision and regulation" of the gun industry, attorneys' fees and costs, and "such other relief as the Court deems just and proper."

Ellett Brothers sought to have the federal district court certify dispositive state law questions to the South Carolina Supreme Court, but that motion was denied (Pet. App. 25a-26a), and summary judgment was granted to the respondent insurance companies. In its opinion, the district court made no attempt to discern or apply South Carolina law, but instead found itself bound by a thirteen year old Fourth Circuit opinion, *Cincinnati Insurance Co. v. Milliken & Co.*, 857 F.2d 979 (4th Cir. 1988), in which the court of appeals – faced with the absence of any South Carolina case law on point – had attempted to predict South Carolina law. In that case, the Fourth Circuit relied upon an earlier decision in *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), which interpreted Maryland law, and the Eighth Circuit's decision in *Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 842 F.2d 977 (8th Cir. 1988), which interpreted Missouri law, to conclude that the meaning of the word "damages" did not include claims for equitable relief. The district court, instead of analyzing South Carolina law, relied on the Fourth Circuit's opinion in *Milliken* and held that the respondent insurance companies do "not have a duty to defend plaintiff in the four pending lawsuits because the relief sought in those cases is equitable in nature and, therefore, does not constitute damages."

On appeal, the Fourth Circuit also refused a motion to certify dispositive state law questions to the South Carolina Supreme Court. *See* Pet. App. 17a-19a. In a divided opinion, the Fourth Circuit similarly rejected petitioner's claim for declaratory relief. Like the district court, the majority made no meaningful attempt to discern or apply South Carolina law to petitioner's claims. Instead, it relied on its holding in *Milliken* which it described as allegedly creating a "default rule" of contract interpretation whereby the term "damages" in insurance contracts will be interpreted so as not

to reference equitable relief. Specifically, the court stated: "However, *our authority ... to create a default rule of contract interpretation* whereby, in the absence of any contrary intent by the parties, the term 'damages' in insurance contracts will be interpreted so as not to reference equitable relief, would seem unassailable." Accordingly, the court of appeals held that the facts of the complaint must allege that Ellett owes legal damages, and that no such facts are alleged here.

Judge Michael rejected the majority's reliance on *Milliken* and any "default rule" created therein, emphasizing that "[t]o the extent that South Carolina deviates from or contradicts our holding in *Milliken*, we must defer to the courts of South Carolina. *See Gooding v. Wilson*, 405 U.S. 518, 526 n.3 (1972)." Pet. App. 12a. Moreover, he explained, although the majority opinion "cites *Braswell v. Faircloth*, 387 S.E.2d 707 (S.C. Ct. App. 1989), as an indication that the legal/equitable distinction in *Milliken* has been reaffirmed by the South Carolina courts," in fact "the ultimate holding in *Braswell* appears to *conflict* with *Milliken's* legal/equitable distinction." Pet. App. 12a (emphasis added). Specifically, Judge Michael concluded that "Braswell in effect rejects *Milliken's* categorical rule excluding equitable relief from the term 'damages' because Braswell awarded coverage for environmental cleanup costs that the trial court had categorized as equitable relief." Pet. App. 14a.

Ellett Brothers' petition for rehearing and petition for rehearing *en banc* were denied on January 23, 2002 .

REASONS FOR GRANTING THE WRIT

I. This is a diversity case initiated in state court and removed to federal court, and therefore the federal court is required to analyze and apply state substantive law.

This is a diversity case initiated in state court and removed to federal court. As such, the federal court is indisputably required to discern and apply state substantive law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Notwithstanding this fundamental principle, which is reflected in the long-standing precedents of this Court and the practice of other courts of appeals, in this case the Fourth Circuit made no meaningful attempt to apply South Carolina rules of insurance contract construction to petitioner's claims for relief. Instead, the Fourth Circuit has admittedly created its own federal common law "default rule" of construction, thereby violating basic principles of federalism and ignoring South Carolina law.

"*Erie* requires that the federal court follow an analytical path that ensures that the law applied in federal proceedings is the law that '*ultimately* would be applied were the case to be litigated in the state courts.'" *Allstate Insurance Co. v. Menards, Inc.*, 285 F.3d 630 (7th Cir. 2002). "[T]he potential for significant intrusion, sometimes with disastrous results, counsels that the task be undertaken with great care, thoroughness and a full realization of the impact that the process, even when executed adroitly, has on 'Our Federalism.' *See Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971)." *Id.* at 638. In this case, the task was not undertaken at all. Neither the district court nor the Fourth Circuit made any meaningful attempt to discern South Carolina law. The district court simply

deferred to the court of appeals who undertook not to identify South Carolina law, but instead to unconstitutionally create its own rule of federal common law.

The Fourth Circuit's failure to make any effort to discern and apply South Carolina law in this case was particularly injurious insofar as the majority's reliance on the "default rule" allegedly established in *Milliken* led the majority to reach a result that not only did not reflect, but was in fact *contrary* to, South Carolina law. First, the South Carolina Supreme Court has never recognized any "default rule of contract interpretation" but instead, has consistently followed rules of interpretation which support a conclusion that where the insurer does not make clear its intention to *exclude* equitable claims, they are among those claims entitled to a defense. Second, the South Carolina Court of Appeals has made it clear in *Braswell* that *Milliken* is not the law of South Carolina. Third, even if the Fourth Circuit had in fact established a "default rule" in *Milliken*, the majority's reliance on that rule is especially problematic because the *Milliken* rule has been substantially undermined by subsequent developments in the state laws on which the *Milliken* court relied. Finally, by creating a conflict between contract law as applied in South Carolina courts on the one hand, and contract law as applied in federal diversity cases arising out of South Carolina on the other hand, the Fourth Circuit's opinion raises the same evils that *Erie* sought to avoid, including the opportunity for forum shopping.

II. The Fourth Circuit's opinion fails to discern and apply South Carolina law and therefore creates federal common law in violation of the constitutional principles set forth in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

It is beyond dispute that in this case, the federal court is required to carefully analyze and apply South Carolina law. Notwithstanding this obligation, the Fourth Circuit's majority opinion merely relied on a "default rule" of contract interpretation allegedly established in *Milliken*.[2] The majority clearly acknowledges this reliance:

> However, our authority therein [in *Cincinnati Insurance Co. v. Milliken & Co.*] to create a default rule of contract interpretation whereby, in the absence of any contrary intent by the

---

[2] Even putting aside the majority's failure to seek to discern and apply South Carolina law to petitioner's claims, the majority's reliance on *Milliken's* "default rule" is curious insofar as no such rule was ever established in *Milliken*. Instead, the Fourth Circuit relied in *Milliken* upon Maryland and Missouri law to fashion an opinion that has subsequently been discredited by the state courts in both Maryland and Missouri. *See infra* at 13-19. Furthermore, as stated in Judge Michael's concurring opinion, the conclusion in *Milliken* has also been repudiated by the South Carolina Court of Appeals in the case of *Braswell v. Faircloth*, 387 S.E.2d 707 (S.C. Ct. App. 1989). *See infra* at 21-22. *Milliken* also contradicts well settled rules of insurance contract construction repeatedly stated by the South Carolina Supreme Court, including the rules of construction set out in *South Carolina State Budget and Control Board v. Prince*, 403 S.E.2d 643 (S.C. 1991), which are ignored by the Fourth Circuit. *See infra* at 19-20.

> parties, the term 'damages' in insurance contracts will be interpreted so as not to reference equitable relief, would seem unassailable and, here, that default rule of contract interpretation is sufficient to sustain the district court summary judgment, because there is nothing in the contract between Ellett and its insurers that evidences an intention to include equitable, in addition to legal, claims for relief, among those as against which Ellett's insurers must defend.

To the contrary, it is plain in light of *Erie* that the court of appeals has no authority to *create* a default rule of contract interpretation or any other rule of contract interpretation not already recognized by the South Carolina Supreme Court.

(1) The Court of Appeals has no authority to create any federal common law.

"There is no federal general common law." *Erie*, 304 U.S. at 78. "It is impossible to overstate the importance of the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*. It does not announce a technical doctrine of federal court procedure or jurisdiction. Rather, it goes to the heart of the relationship between the federal government and the states, and returns to the states a power that for nearly a century had been exercised by the federal government." 19 Wright, Miller and Cooper, *Federal Practice and Procedure* § 4503 at 24 (1996). In *Erie*, "Justice Brandeis states only that no clause in the Constitution purports to confer upon the federal courts the power to declare substantive rules of common law applicable in a state, and that the federal courts 'have invaded rights which in our opinion are reserved by the Constitution to the several States.'" 19 Wright, *et al.*, *supra*

§ 4505 at 52. The narrow constitutional holding in the *Erie* decision is that the federal courts have no authority to declare substantive, common law rules of general applicability. *Id.* Instead, as this Court has repeatedly explained, "*Erie* mandates that a federal court sitting in diversity apply the substantive law of the forum State, absent a federal statutory or constitutional directive to the contrary." *Salve Regina College v. Matthew*, 499 U.S. 225, 226 (1991).

(2) The Fourth Circuit's creation of its own common law rule of contract interpretation conflicts with every other United States Circuit Court of Appeals.

Contrary to the Fourth Circuit's opinion in petitioner's case, every other circuit has consistently followed the *Erie* doctrine and, in diversity cases, applied the relevant, applicable state law. *See, e.g.*, *North Am. Specialty Ins. Co. v. Lapalme*, 258 F.3d 35, 37 (1st Cir. 2001) ("In this diversity case, we look to state law . . . for the substantive rules of decision."); *Rosenfield v. Basquait*, 78 F.3d 84, 88 (2d Cir. 1996) ("Because state law supplies the rules in diversity-of-citizenship cases . . . New York law, including its statute barring the testimony of certain interested witnesses, must be given effect."); *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 487 (3d Cir. 1985) ("Federal courts sitting in diversity cases must apply the substantive laws of the states in which they sit ...."); *Delta Air Lines, Inc. v. McDonnell Douglas Corp.*, 503 F.2d 239, 243 (5th Cir. 1974) (following state conflict of law rules in diversity case); *Coffey v. Foamex L.P.*, 2 F.3d 157, 160 n.1 (6th Cir. 1993) ("This court, in exercising diversity jurisdiction, applies the substantive state law in accordance with *Erie R. Co. v. Tompkins*."); *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 669 (7th Cir. 2001) ("In fulfilling the mandate of

Erie . . . a United States district court sitting in diversity . . . must apply the law of the state as it believes the highest court of the state would apply it if the issue were presently before that tribunal."); *Oriental Trading Co. v. Firetti*, 236 F.3d 938, 944 (8th Cir. 2001) ("In this diversity action, state law governs issues of substantive law."); *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 611 (9th Cir. 1975) (applying state conflict of law provisions in diversity case); *Stauth v. National Union Fire Ins. Co. of Pittsburgh*, 236 F.3d 1260, 1267 (10th Cir. 2001) ("As a federal court sitting in diversity of citizenship litigation, our duty under *Erie v. Tompkins* principles is of course to conform to [Kansas's] substantive law."); *Macon-Bibb County Industrial Authority v. Nord Bitumi, U.S., Inc.*, 77 F.3d 417, 419 (11th Cir. 1996) ("This is a diversity case; thus, under *Erie Railroad Co. v. Tompkins*, Georgia law is applied to decide the substantive issues."); *Poole v. Kelly*, 854 F.2d 760, 763 (D.C. Cir. 1992) (holding that, although the District is not a state, the principles of Erie are to be followed by federal courts adjudicating diversity actions in the District of Columbia).

This petition should be granted because the Fourth Circuit's opinion conflicts with every circuit in the country, all of whom have consistently followed *Erie*. *See Allstate Insurance Co. v. Menards, Inc.*, 285 F.3d 630, 637 (7th Cir. 2002) ("In sum, we adhere today to the general rule, articulated and applied throughout the United States, that, in determining the content of state law, the federal courts must assume the perspective of the highest court in that state and attempt to ascertain the governing substantive law on the point in question.")

(3) The respondents have been allowed to illegally forum-shop in violation of the *Erie* doctrine.

Erie refuted the construction of the Rules of Decision Act previously set out in *Swift v. Tyson*, 41 U.S. 1 (1842), primarily because it allowed inequitable forum-shopping. As stated by Justice Brandeis:

> *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizens. Thus, the doctrine rendered impossible equal protection of the law.

304 U.S. at 74-75.

In this case, a South Carolina corporation sought the protection of its state's laws regarding the construction of a South Carolina insurance contract issued on a South Carolina risk. After suit was initiated in South Carolina state court, the respondent insurance companies removed the case to federal court. In the end, this forum-shopping afforded the respondents an outcome they could not have achieved in a South Carolina court. Instead, this case was decided upon a federally-created "default rule" never recognized by the South Carolina Supreme Court or any other South Carolina court. In fact, as pointed out by Judge Michael in his opinion below, South Carolina courts have expressly refuted the conclusion in the majority opinion. As a result, the ultimate inequity has been created. While diversity jurisdiction was created to assure that non-citizens were not unfairly treated in local

venues, the result in this case is that a South Carolina resident is not afforded the protection of South Carolina law.

The implications of this "lawmaking" by the Fourth Circuit are obvious. "Until corrected by the state supreme court, such incorrect predictions inevitably skew the decisions of persons and businesses who rely on them and inequitably affect the losing federal litigant who cannot appeal the decision to the state supreme court; they may even mislead lower state courts that may be inclined to accept federal predictions as applicable precedent. Indeed, some evidence suggests that federal courts have shown a preference for citing federal decisions on state law instead of state decisions at rates approaching pre-*Erie* levels." Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va.L.Rev. 1671 (1992).

III. Neither the opinion below nor the opinion in *Cincinnati Insurance Company v. Milliken* represents South Carolina law.

The Fourth Circuit has never analyzed the applicable South Carolina law or attempted to discern how the Supreme Court of South Carolina would interpret the undefined term "damages" in the relevant context. Instead, in *Milliken*, the court simply concluded that South Carolina law is not different from Maryland law, a proposition since conclusively refuted by the Maryland Court of Appeals. In the majority opinion below, instead of recognizing the fallacy in *Milliken*, the Fourth Circuit has concluded that it created a federal "default rule" in *Milliken* and now applies that rule to affirm the district court's reliance on *Milliken*. The most striking aspect of the majority opinion below is that the Fourth Circuit makes no pretense of analyzing or discerning South Carolina law. Instead, it continues to rely upon, and compounds the

fallacy of, the 1988 *Milliken* opinion.

(1) *Milliken* has been conclusively rejected, and furthermore, it disregards South Carolina law.

Milliken resorted to federal interpretations of Maryland and Missouri law in an effort to predict how South Carolina courts would resolve a novel issue of South Carolina law. More specifically, *Milliken* relied upon *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), which interpreted Maryland law, and *Continental Ins. Co. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977, 985-87 (8th Cir. 1988) ("NEPACCO"), which interpreted Missouri law. Based upon these two decisions, *Milliken* concluded that the meaning of the word "damages" in an insurance policy did not include claims for equitable relief.[3] However, in *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021 (Md.1993) and *Farmland Indus. Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 510 (Mo. 1997), the highest courts of Maryland and Missouri rejected *Armco* and *NEPACCO* and therefore made *Milliken* a nullity.

In *Armco*, the question presented was "whether the claim brought against Armco in Missouri constitutes a claim for 'damages' as defined in the insurance agreement between Armco and Maryland Casualty." In answering this question, the Fourth Circuit, applying Maryland law, recognized that "[i]t is black-letter law that the terms of an insurance policy

---

[3] The *Milliken* court made no effort to analyze South Carolina law but instead concluded that it perceived "no material distinctions between the South Carolina and Maryland laws in the construction and interpretation of insurance policies that should cause us to deviate from *Armco* and *Mraz*." 857 F.2d at 980-981.

are to be construed according to the meaning a reasonably prudent layman would infer." 822 F.2d at 1352. However, the court continued its analysis by noting that Maryland law has "adopted the somewhat narrow, technical definition of damages." Thus, the Fourth Circuit held that "[t]he best approach in construing the term 'damages' as contained in this insurance contract is to afford it the *legal, technical meaning*[.]" *Id.* (emphasis added).

The court addressed the same issue in *Milliken* and began its analysis by revisiting the *Armco* decision. Perceiving no material distinctions between South Carolina and Maryland law, but analyzing neither, the court followed the reasoning of *Armco*.[4] 857 F.2d at 980. Although the *Milliken* court correctly noted that absent ambiguity, South Carolina law interprets the language of an insurance policy according to its plain, ordinary, and popular meaning, the court proceeded to define the term "damages" in the "insurance context" and according to its "legal meaning":

> In the insurance context, the word "damages" is not ambiguous. It means legal damages.

---

[4] The *Milliken* court reached this conclusion despite the fact that Maryland courts, unlike their South Carolina counterparts, "have consistently rejected the rule that insurance policies are always to be construed most strictly against the insurer." *Truck Ins. Exchange v. Marks Rentals, Inc.*, 418 A.2d 1187, 1191 (Md. 1980). However, given the premise that there is no "material distinction" between South Carolina and Maryland law in the construction and interpretation of insurance policies, a court, if persuaded at all by *Milliken*, would now follow Maryland law as enunciated in *Bausch & Lomb*, 624 A.2d at 1033 ("The reasonably prudent layperson does not cut nice distinctions between the remedies offered at law and in equity.").

> *Northeastern Pharmaceutical*, 842 F.2d at 985-87; *Armco,* 822 F.2d at 1352. As a general rule comprehensive general liability policies do not extend coverage to claims for equitable relief. We have no doubt that South Carolina law, in concert with Maryland and Missouri, would recognize that a general comprehensive liability policy which obligated the insurer to pay 'all sums which the insured shall become legally obligated to pay as damages' would not cover claims for which the insured is equitably obligated to pay.

Id. at 981. Within this technical context, the court upheld the district court's ruling that Cincinnati Insurance was not obligated to cover equitable claims.[5]

Subsequent decisions by the highest courts in Maryland and Missouri demonstrate that both *Armco* and *NEPACCO* misapplied the law of their respective states. In *Bausch & Lomb*, Maryland's highest court recognized that "[t]o the extent it suggests that the term 'damages' imports a distinctively legal meaning in insurance matters, *Armco*

---

[5] As noted in *Boeing Co. v. Aetna Cas. & Sur. Co.*, 784 P.2d 507, 511-515 (Wash. 1990), this holding conflicts with that of 56 judges across the country who agree that "damages" includes equitable claims. Furthermore, as the South Carolina Supreme Court has pointed out, "[t]hat different courts have construed the language of an insurance policy differently is some indication of ambiguity." *Greenville County v. Insurance Reserve Fund*, 443 S.E.2d 552, 553 (S.C. 1994).

misperceives the law of Maryland." *Id.* at 1032.[6] As the Maryland Court of Appeals explained:

> 'Damages' in the common usage means the reparation in money for a detriment or injury sustained. The reasonably prudent layperson does not cut nice distinctions between the remedies offered at law and in equity. Absent an express provision in the document itself, insurance policy-holders surely do not anticipate that coverage will depend on the mode of relief, i.e a cash payment rather than an injunction, sought by an injured party.

---

[6] Other courts also recognize the incongruities of *Armco*. As the North Carolina Supreme Court noted, "[I]n *Armco*, the Fourth Circuit did not use the 'ordinary' meaning of the word damages to deny recovery." *C.D. Spangler v. Indus. Crankshaft and Engineering Co., Inc.*, 388 S.E.2d 557, 566, n. 11 (N.C. 1990). The North Carolina Supreme Court went on to state that "the better reasoned decisions find that the term 'damages' as used in the coverage provisions of liability policies include the types of expenditures under consideration." *Id.* at 556; *see also AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1271 (Cal. 1990) ("In our view, the *Armco* approach to what constitutes 'damages' for insurance policy purposes is unduly narrow."); *Metro Wastewater Recl. Dist. v. Continental Cas. Co.*, 834 F.Supp. 1254, 1259 (D.Col. 1993) (Recognizing that *Armco* has been "severely criticized by courts interpreting the laws of states that adhere to the plain meaning rule of contract interpretation."); *National Indem. Co. v. United States Pollution Control, Inc.*, 717 F.Supp. 765, 766 (W.D.Okla. 1989) (Rejecting *Armco* and holding that "the better approach is to construe the meaning of damages in its ordinary and popular sense."). Thus, the underlying legal foundation relied upon by the *Milliken* court was incorrect.

Id. at 1033. Similarly, in *Farmland Industries, Inc. v. Republic Ins. Co.*, 941 S.W.2d 505 (Mo. 1997), the Missouri Supreme Court held that the Eighth Circuit's prediction in *NEPACCO* was wrong.

> The *NEPACCO* court misconstrues and circumvents Missouri law. The cases upon which the *NEPACCO* court relies for the proposition that "damages" distinguishes between claims at law and claims at equity are not persuasive. The cases do not determine the ordinary meaning of "damages" as required by Missouri law. Furthermore, no authority allows this Court to define words "in the insurance context." To give words in an insurance contract a technical meaning simply by reading them "in the insurance context," would render meaningless our law's requirement that words be given their ordinary meaning unless a technical meaning is plainly intended.

Id. at 510.[7]

---

[7] *See also Lindsay Mfg. Co. v. Hartford Acc. & Indem. Co.*, 118 F.3d 1263, 1269 (8th Cir. 1997) (Recognizing that *NEPACCO* misapplied Missouri law and holding "that under Nebraska law the term 'as damages' can fairly be interpreted in more than one way, and is therefore ambiguous. Being ambiguous, we interpret the term 'as damages' to include both legal damages and equitable relief because that interpretation favors the insured."); *Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507, 1512 n. 3 (9th Cir. 1991) (Holding that *Armco* and *NEPACCO* are not persuasive authority under Idaho law as they explicitly reject the ordinary person's view of the term "damages,"

Based upon *Armco*, and the Eighth Circuit's decision in *NEPACCO*, *Milliken* concluded that the word "damages" does not include claims for equitable relief. However, *Bausch & Lomb* and *Farmland Industries* collapsed *Milliken's* legal foundation and confirmed that the term "damages" includes claims for equitable relief.

More importantly, *Milliken's* construction of "damages" in the "insurance context" disregards the law of South Carolina, which mandates the application of the plain and ordinary meaning to terms in an insurance policy. *Sloan Construction Co. v. Central Nat'l Ins. Co.*, 236 S.E.2d 818, 819 (S.C. 1977). As the vast body of case law demonstrates, a reasonable person reading the policy would not make the technical distinction between legal and equitable damages

---

and that *Milliken* merely adopts *Armco's* and *NEPACCO'S* reasoning without any analysis of its own.). Furthermore, most federal courts construing the laws of various states have held that equitable claims are covered damages under CGL policies. *See Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048, 1053 (5th Cir.1996) (Texas law); *Anderson Dev. Co. v. Travelers Indem. Co.*, 49 F.3d 1128, 1133 (6th Cir.1995) (Michigan law); *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940, 946-47 (D.C.Cir.1991) (Missouri law); *Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507, 1511-15 (9th Cir.1991) (Idaho law); *New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1188 (3rd Cir.1991) (Delaware law) rev'd on other grounds, *New Castle County v. Hartford Accident & Indem. Co.*, 970 F.2d 1267 (3rd Cir. 1992); *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023, 1029-30 (2nd Cir.1991) (Vermont law); *Hays v. Mobil Oil Corp.*, 930 F.2d 96, 100-02 (1st Cir.1991) (Massachusetts law); *Avondale Indus. Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1207 (2nd Cir.1989) (New York law); *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir.1986) (Oregon law).

asserted in *Milliken*. A technical definition of this sort contradicts the law of South Carolina. As *Spangler* and other cases countrywide demonstrate, the plain and ordinary meaning of the word "damages" includes claims for equitable relief.

Furthermore, *Milliken* construes an undefined term in a manner to defeat coverage. This construction is contrary to the general rules governing the construction of insurance policies in South Carolina and the specific holding of the South Carolina Supreme Court in *Prince* that when a policy is susceptible to more than one reasonable interpretation, one of which would provide coverage, a court *must* hold as a matter of law in favor of coverage. *Prince*, 403 S.E.2d at 647. The so-called "default rule" now "created" by the Fourth Circuit has never been adopted by the South Carolina Supreme Court. Instead, it is clear from *Prince* that in the event of an insurer's failure (or default) to make the policy clear, it must be construed *against* the insurer.[8]

(2) The Fourth Circuit's opinion directly contradicts South Carolina law.

Under South Carolina law, when a policy is susceptible to more than one reasonable interpretation, one of

---

[8] *Prince* also recognized the well-settled South Carolina principle that insurance contracts are generally construed against the party who prepares them and liberally in favor of the insured, *McCracken v. Gov't Employees Ins. Co.*, 325 S.E.2d 62 (S.C. 1985), and that a policy which does not limit recovery to actual or compensatory damages, must be read as encompassing other damages. Consequently, it is clear that South Carolina law does not, in the absence of a restricting definition, limit the term "damages" to *compensatory* damages.

which would provide coverage, a court must hold as a matter of law in favor of coverage. *Prince*, 403 S.E.2d at 647. In light of the vast number of cases that have rejected St. Paul's interpretation of the term "damages," it is incomprehensible that Ellett Brothers' interpretation of the term is not at least one reasonable interpretation.[9] Clearly, the term "damages" is susceptible of more than one reasonable interpretation where it is not defined in the St. Paul policy and a majority of courts have extended coverage to both claims in law and equity. Under these circumstances and the rules of construction enunciated by the South Carolina Supreme Court in *Prince*, Ellett Brothers is entitled to coverage as a matter of law.

---

[9] *See, e.g., Boeing Co.*, 784 P.2d at 511, where the court noted: "Numerous federal and sister-state decisions (counsel at oral argument stated over 56 judges across the country) agree that 'damages' include cleanup costs." The Washington Supreme Court also noted that, as here, there are long sections of the contracts defining all of the key terms but no defining words about damages. *Id. See also Bausch & Lomb*, 625 A.2d at 1030, noting that the majority of state appellate courts have construed the term "damages" to include both monetary compensation to government agencies or aggrieved third parties and the expense of complying with environmental injunctions. The *Bausch & Lomb* court also noted: "Nowhere in the contract is there any express indication that the parties wished to ascribe a special or technical meaning to the term 'damages.' Unlike many other terms used throughout the document, the word is not listed in the policy's definitions section with which the contract begins." *Id.* at 1031.

(3) The South Carolina Court of Appeals' decision in *Braswell v. Faircloth* rejects *Milliken*.

Finally, the Fourth Circuit's failure to discern and apply South Carolina law, and to rely instead on *Milliken*, carries significant consequences insofar as *Milliken* has been rejected by the South Carolina Court of Appeals in *Braswell v. Faircloth*, 387 S.E.2d 707 (S.C. Ct. App. 1989), which expressly conferred coverage for equitable claims.

In *Braswell*, a storage tank valve ruptured, and chemicals spilled onto a field adjacent to the tank. The South Carolina Department of Health and Environmental Control issued an administrative consent order requiring the owner to clean up the existing damage. The Environmental Protection Agency subsequently issued its own order requiring the removal of other stored chemicals, which had not caused any damage.

The applicable insurance policy in *Braswell* obligated the insurer to pay "all sums which the Insured shall become legally obligated to pay as damages because of property damage to which this insurance applies caused by an occurrence." 387 S.E.2d at 710. While the court concluded that there was no coverage for the cost to remove "stored chemicals which had not yet caused physical injury to property," it held "that an occurrence causing property damage did result . . . as to the spill of the 1000 gallons of chemicals and only as to the . . . damages directly related to the contamination of the land by this spill." *Id.* at 711. Consequently, the court held that the costs associated with rectifying this property damage *were covered* under the policy. Thus, *Braswell* directly contradicts the Fourth Circuit's holding in *Milliken*. *See*, Nancy W. Monts, INSURANCE COVERAGE FOR SUPERFUND CLAIMS: ARE

RESPONSE COSTS RECOVERABLE DAMAGES?, 41 S.C.L.R. 871, 879 (1990).

As stated by Judge Michael below, *Braswell* refutes the legal/equitable distinction made in *Milliken*, but this fact is entirely disregarded in the majority opinion. "'An intermediate appellate state court * * * is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" *Commissioner of Internal Revenue v. Bosch*, 387 U.S. 456, 465 (1967). Accordingly, the Fourth Circuit was not at liberty to ignore *Braswell* and fashion its own federal common law.

IV. In sum, the Fourth Circuit has turned the *Erie* doctrine on its head.

Neither the district court nor the court of appeals has made any attempt to follow the constitutional principles in *Erie*. First, the district court simply relied on the Fourth Circuit's opinion in *Milliken*, which has been soundly refuted by state courts in Maryland, Missouri, and virtually every other state in the country. Second, the Fourth Circuit, in its majority opinion, does not bother to recognize that *Milliken*, and its premise based on Maryland and Missouri law, have been soundly rejected by the state courts who have authority, under our federal system, to make decisions about state law. Third, when faced with the proposition that *Milliken* is bad law, the Fourth Circuit makes no attempt to analyze or discern the applicable South Carolina law. Instead, the Fourth Circuit, by its own words, declares that it has created a default rule, which has never been recognized by the South Carolina Supreme Court or any other South Carolina state court. Last, the Fourth Circuit's majority opinion contains no

citation to any South Carolina case that recognizes a "default rule" of insurance contract interpretation. The court of appeals has "created" a rule of contract construction that produces a federal result. The *Erie* doctrine does not allow such a result in a diversity case.

If the Fourth Circuit's opinion is allowed to stand, it will create a result that would not have occurred if this case had not been removed and therefore "shopped" to the federal court in order to get an unconstitutional "federal" result. This and other attempts by the Fourth Circuit to create federal common law will not only pervert individual outcomes but also have the potential to pervert an entire body of law. "[T]here is a significant impact on the health of our federalism as federal courts interpret, with increasing frequency, issues of state law. As the same author [Judge Sloviter] pointed out, there is some evidence that federal courts are not the best prognosticators of the future course of state doctrinal issues. Unless and until corrected, these missteps by federal courts can have a grave impact on the principled and orderly growth of state law principles." *Menards*, *supra* at 637-638.

CONCLUSION

The Fourth Circuit has not taken the care or thoroughness required of an *Erie* analysis and therefore has violated "Our Federalism." Moreover, its failure to seek to discern and apply South Carolina law is directly contrary to the practice of other courts of appeals and carries potentially serious consequences well beyond the facts of petitioner's case. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Thornwell F. Sowell, III
(Counsel of Record)
SOWELL GRAY STEPP &
LAFFITTE, L.L.C.
1310 Gadsden Street
Columbia, South Carolina 29211
(803) 929-1400

Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016
(202) 237-7543

Attorneys for Petitioner Ellett Brothers, Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1130, No. 00-2533
CA-00-1269-3-19

[Filed January 23, 2002]

Ellett Brothers, Incorporated,
Plaintiff-Appellant

v.

United States Fidelity & Guaranty Company; Fidelity and Guaranty Insurance Underwriters, Incorporated; St. Paul Mercury Insurance Company,
Defendants-Appellees

and

International Insurance Company; RLI Insurance Company; Mount Hawley Insurance Company; United National Insurance Company,
Defendants

American Insurance Association;
National Shooting Sports Foundation;
National Association of Independent Insurers,
Amici Curiae

Ellett Brothers, Incorporated,
Plaintiff-Appellee

v.

United States Fidelity & Guaranty Company; Fidelity and Guaranty Insurance Underwriters, Incorporated; St. Paul Mercury Insurance Company,
Defendants-Appellants

and

International Insurance Company; RLI Insurance Company; Mount Hawley Insurance Company; United National Insurance Company,
Defendants

American Insurance Association; National Shooting Sports Foundation; National Association of Independent Insurers,
Amici Curiae

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ _____
Patricia S. Connor
CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1130, No. 00-2533

[Filed, December 28, 2001]

Ellett Brothers, Incorporated,
Plaintiff-Appellant,

v.

United States Fidelity & Guaranty Company; Fidelity and Guaranty Insurance Underwriters, Incorporated; St. Paul Mercury Insurance Company,
Defendants-Appellees,

and

International Insurance Company; RLI Insurance Company; Mount Hawley Insurance Company; United National Insurance Company,
Defendants.

American Insurance Association; National Shooting Sports Foundation; National Association of Independent Insurers,
Amici Curiae.

Ellett Brothers, Incorporated,
Plaintiff-Appellee,

v.

United States Fidelity & Guaranty Company; Fidelity and Guaranty Insurance Underwriters, Incorporated; St. Paul Mercury Insurance Company,
Defendants-Appellants,

and

International Insurance Company; RLI Insurance Company; Mount Hawley Insurance Company; United National Insurance Company,
Defendants.

American Insurance Association; National Shooting Sports Foundation; National Association of Independent Insurers,
Amici Curiae.

Appeals from
United States District Court
for the District of South Carolina, at Columbia
Dennis W. Shedd, District Judge
(CA-00-1269-3-19)

JUDGES:

Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges. Judge Luttig wrote the opinion, in which Judge Wilkinson joined. Judge Michael wrote an

opinion concurring in part and concurring in the judgment.

OPINION

LUTTIG, Circuit Judge:

Ellett Brothers, a handgun manufacturer, is a named defendant in four lawsuits. In three of these lawsuits, the plaintiffs are California municipalities who allege that Ellett's marketing of handguns creates public and private nuisances and violates the California Business and Professions Code. The municipalities request injunctive relief to abate the nuisances and to prevent violations of the Business and Professions Code, restitution to the public of funds obtained in violation of the Code, disgorgement of profits acquired by violating the Code, civil penalties for violating the Code, and costs of suit. One of these three complaints, brought by southern California municipalities, also requests attorneys' fees and "further relief as the Court deems equitable and just." J.A. at 474. The California municipalities do not seek compensatory or punitive damages.

In the fourth lawsuit, the NAACP alleges that Ellett created and maintained an illegal secondary market for guns. J.A. at 587-89. It seeks an injunction requiring Ellett to change its marketing practices, an injunction requiring Ellett to contribute to a fund to supervise gun dealers, attorneys' fees, and "further relief as this Court deems just and proper." J.A. at 594-96. The NAACP similarly does not seek compensatory or punitive damages.

Ellett's commercial general liability policy obligates its insurers to pay "those sums that the insured becomes legally

obligated to pay as damages because of 'bodily injury' or 'property damage'" and to defend Ellett "against any 'suit' seeking those damages." J.A. at 190. Ellett seeks a declaratory judgment that its insurers must defend the above-referenced lawsuits and indemnify Ellett. The district court, concluding that the California municipalities and the NAACP seek only equitable relief, and not damages, against Ellett, granted summary judgment to the insurers on the duty to defend claim. J.A. 163- 64. The district court also allowed Ellett to dismiss voluntarily its indemnity claim against its insurers pursuant to Fed. R. Civ. P. 41. J.A. at 123.

For the reasons that follow, we affirm.

I.

In appeal of the district court's summary judgment to Ellett's insurers, Ellett argues that the term "damages" is susceptible to more than one reasonable interpretation and that the district court therefore erred in construing the term as necessarily limited to claims for "legal" relief, as opposed to claims for either "legal" or "equitable" relief.

We have previously held that the term "damages" in an insurance contract unambiguously means legal damages, and that "[a]s a general rule comprehensive general liability policies do not extend coverage to claims for equitable relief." *Cincinnati Ins. Co. v. Milliken and Co.*, 857 F.2d 979, 981 (4th Cir. 1988). *See also Braswell v. Faircloth*, 300 S.C. 338, 387 S.E.2d 707, 710-11 (S.C. Ct. App. 1989) (citing *Milliken* with approval). We may well have been without authority, in the context of the single contractual dispute at issue in *Milliken*, to so define the term "damages" for all

contracts *in futuro*, as each contract is to be interpreted according to the intent of the parties. However, our authority therein to create a default rule of contract interpretation whereby, in the absence of any contrary intent by the parties, the term "damages" in insurance contracts will be interpreted so as not to reference equitable relief, would seem unassailable. And, here, that default rule of contract interpretation is sufficient to sustain the district court's summary judgment, because there is nothing in the contract between Ellett and its insurers that evidences an intention to include equitable, in addition to legal, claims for relief, among those as against which Ellett's insurers must defend.

Ellett makes much of the fact that "damages" is not defined in the policy, Appellant's Br. at 21-22, and that South Carolina insurance contracts are generally construed against the party that prepares them and liberally in favor of the insured. *McCracken v. Government Employees Ins. Co.*, 284 S.C. 66, 325 S.E.2d 62 (1985). However, because neither the South Carolina courts nor the parties to this contract have evinced any intent to deviate from the default rule established in *Milliken*, we hold that the term "damages," as used in this contract, does mean legal damages only, and therefore does not extend to claims for equitable relief.

II.

As to whether the four lawsuits against Ellett seek legal damages, as found by the district court, under South Carolina law a liability insurance company's obligation to defend its insured is determined by the allegations of the underlying complaint. *See R.A. Earnhardt Textile Mach. Div., Inc. v. South Carolina Ins. Co.*, 277 S.C. 88, 282 S.E.2d

856, 857 (S.C. 1981). If the suit includes any cause of action covered by the policy, the insurer must defend, even if the suit joins other causes of action beyond the policy's scope. *See Town of Duncan v. State Budget & Control Board*, 326 S.C. 6, 482 S.E.2d 768, 774 (S.C. 1997).

We have no difficulty concluding that none of the complaints seeks "damages" against Ellett. Neither the California municipalities nor the NAACP seek compensation for past injuries. Although they seek money from Ellett in the form of restitution, disgorgement, civil penalties, attorney's fees, cost of suit, and (in the NAACP suit) contribution to a fund to monitor gun dealers, none of these constitutes "damages." Restitution and disgorgement require payment of the defendant's ill-gotten gain, not compensation of the plaintiff's loss. This court has described restitution as an "equitable remedy." *See Milliken*, 857 F.2d at 980. And civil penalties, likewise, are not "damages" payable to the victim, but fines or assessments payable to the government. The NAACP's proposed fund to monitor gun dealers is forward-looking, prospective relief -- not compensation for past injuries inflicted.

The contract itself distinguishes costs and attorneys' fees from "damages," by obligating the insurers to pay these amounts only if the insurer was required to defend the suit in the first place. J.A. 551. The same is true for pre-judgment and post-judgment interest. *Id.* These cannot be included within the meaning of "damages" in this contract.

Finally, although two of the complaints request "such further relief as this court deems just," such language does not invoke the insurer's duty to defend. Under South Carolina

law, the facts of the complaint must allege that Ellett owes legal damages, *Earnhardt*, 282 S.E.2d at 857, and no such facts are alleged here. A prayer for "such further relief" is not a factual allegation supporting a claim for legal damages.

III.

The district court also granted Ellett's motion to dismiss without prejudice its indemnity claim against its insurers, holding that the claim was not ripe and that Ellett could be irreparably harmed with respect to the underlying suits. J.A. at 123. The insurers cross-appeal, arguing that this was error and that they were entitled to summary judgment on the indemnity claim.

A plaintiff's motion to voluntarily dismiss a claim should not be denied absent plain legal prejudice to the defendant, *see Andes v. Versant Corp.* A district court's decision to grant such a motion is reviewed for abuse of discretion, *see Davis v. USX Corp.*, 819 F.2d 1270 (4th Cir. 1987). We hold that the district court did not abuse its discretion in dismissing Ellett's indemnification claim without prejudice. First, under South Carolina law, while the duty to defend is based on the allegations in the complaint, *see Earnhardt*, 282 S.E.2d at 857, the duty to indemnify is based on evidence found by the factfinder, *see Jourdan v. Boggs/Vaughn Contracting, Inc.*, 324 S.C. 309, 476 S.E.2d 708, 711 (S.C. Ct. App. 1986). Because no findings of fact have been made in the four lawsuits against Ellett, the indemnity claim is not ripe and the district court correctly dismissed it. Moreover, the insurers will not be irreparably harmed by granting Ellett's motion to voluntarily dismiss its indemnity complaint, as the prospect of a subsequent lawsuit

does not constitute prejudice for purposes of Rule 41(a)(2). *See Davis*, 819 F.2d at 1274.

For the reasons given, the judgment of the district court is affirmed.

AFFIRMED

CONCUR

MICHAEL, Circuit Judge, concurring in part and concurring in the judgment:

I concur in the judgment and in part III of the majority's opinion. The majority, relying on our 1988 decision in *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979 (4th Cir. 1988), interprets South Carolina law to mean that the term "damages" in an insurance contract generally refers to legal damages and not to equitable relief. South Carolina law, however, has not remained static since 1988, and it now appears that "damages" can include equitable relief in some instances. At the very least, the question is unsettled. I therefore respectfully decline to join parts I and II of the majority's opinion. Regardless of the state of South Carolina law on the legal/equitable distinction, contract terms are nevertheless limited to their ordinary, plain meaning. Here, the underlying lawsuits do not seek "damages" in the plain sense of the word: they do not seek compensation for past injuries. Accordingly, I vote to affirm the judgment.

I.

The majority cites *Braswell v. Faircloth*, 300 S.C. 338, 387 S.E.2d 707 (S.C. Ct. App. 1989), as an indication that the legal/equitable distinction in *Milliken* has been reaffirmed by the South Carolina courts. *Braswell* does cite *Milliken* with approval, but not for the proposition that "damages" means legal damages. Indeed, the ultimate holding in *Braswell* appears to conflict with *Milliken*'s legal/equitable distinction. To the extent that South Carolina case law deviates from or contradicts our holding in *Milliken*, we must defer to the courts of South Carolina. *See Gooding v. Wilson*, 405 U.S. 518, 526 n.3, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972).

In *Braswell* the South Carolina Court of Appeals was presented with an action by the lessor of property who sought a declaration that his former lessee's insurance policy covered costs for the removal of stored chemicals from the property and costs for a government-ordered cleanup of a chemical spill on the property. *Braswell*, 387 S.E.2d at 708-09. The insurance contract in *Braswell*, like the contract here, limited coverage to lawsuits seeking "damages" resulting from "property damage" and did not define the term "damages." *Id.* at 709. The trial court had dismissed all of the lessor's claims as falling outside the definition of "property damage." *Id.* at 710. In addition, the trial court had held that the lessor's lawsuit "was restitutionary in nature because it was an attempt to restore the status quo," and therefore the suit sought only equitable relief, which did not count as a suit seeking "damages." *Id.*

On appeal the lessor in *Braswell* sought to distinguish *Milliken* by arguing that his action was "not a suit for restitution or equitable relief but . . . a suit for damages for breach of contract." *Id.* at 711. The South Carolina Court of Appeals brushed aside the question of whether the suit was legal or equitable, saying, "[c]all it what you may, the underlying issue is whether [the lessee's] insurer must indemnify under its policy for the costs incurred in complying with a government directive." *Id.* The court resolved this coverage issue by looking at whether the suit sought costs associated with remediating past or future injuries. As to stored chemicals that had "not yet caused physical injury to property," the court held: "under the authority of [*Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987),] and *Milliken and Company* . . . the costs of removal of the stored waste is [sic] not covered." *Id.* As to the costs of the government ordered cleanup of the chemical spill, the court held that "an occurrence causing property damage did result . . . as to the . . . damages directly related to the contamination of the land by [the] spill [of the 1000 gallons of chemicals]." *Id.* The South Carolina Court of Appeals reversed the trial court on this one issue, concluding that the costs associated with cleanup of the chemical spill were covered under the insurance policy. *Id.* While the court did not say so explicitly, it necessarily determined that these costs constituted "damages" as that term was used in the policy. *Cf. Hazen Paper Co. v. USF&G*, 407 Mass. 689, 555 N.E.2d 576, 582-83 (Mass. 1990) (holding that costs for removal of 115 drums of hazardous materials were not covered because no damage had occurred, but that costs for a government-ordered cleanup of spilled hazardous materials were "damages" and therefore covered).

Thus, *Braswell* cites *Milliken* approvingly for the idea that "future response costs" do not constitute "damages" because no physical injury has yet occurred. *Compare Braswell, 387 S.E.2d at 711, with Milliken, 857 F.2d at 980.* Nevertheless, *Braswell* in effect rejects *Milliken*'s categorical rule excluding equitable relief from the term "damages" because *Braswell* awarded coverage for environmental cleanup costs that the trial court had categorized as equitable relief. *See* Nancy W. Monts, *Insurance Coverage for Superfund Claims: Are Response Costs Recoverable Damages?*, 41 S.C. L. Rev. 871, 878-79 (1990) (noting that the holding in *Braswell* implicitly contradicts *Milliken*'s legal/equitable distinction).

Neither the South Carolina Supreme Court nor its Court of Appeals has fully addressed whether "damages" can include equitable relief in the insurance context. In this case, the result is the same whether we interpret the term "damages" to mean only "legal damages" or simply to mean compensation for past injury. The interpretation chosen, however, can make a difference in other contexts. For example, the question of whether the term "damages" in an insurance contract encompasses equitable environmental cleanup costs is an intensely disputed area of state contract and insurance law. *See, e.g., Braswell*, 300 S.C. 338, 387 S.E.2d 707; *Boeing Co. v. AETNA Cas. & Sur. Co.*, 113 Wn.2d 869, 784 P.2d 507, 515 (Wa. 1990) (rejecting a federal court's prior interpretation of Washington law and stating, "we agree with the majority of cases across the country that the plain meaning of damages does not distinguish between sums awarded on a 'legal' or 'equitable' basis and that the plain meaning of damages may include cleanup costs to the extent that these costs are incurred

because of property damage."); *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505 (Mo. 1997); *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 625 A.2d 1021 (Md. 1993). Because this case may be resolved on an alternate and well-established ground, I would not apply our rule in *Milliken*, which appears to be in conflict with the result in *Braswell*.

II.

The legal/equitable distinction aside, the lawsuits underlying this case still do not seek "damages" as that term is commonly understood. South Carolina law provides that a term in an insurance contract, as in contracts generally, should not be expanded beyond "its plain, ordinary and popular meaning." *State Farm Fire & Cas. Co. v. Breazell*, 324 S.C. 228, 478 S.E.2d 831, 832 (S.C. 1996). The term "damages" is ordinarily meant to include "the estimated reparation in money for detriment or injury sustained." *Webster's Third New Int'l Dictionary of the English Language* 571 (1989); *see also Farmland Industries*, 941 S.W.2d at 508; *Bausch & Lomb*, 625 A.2d at 1032 (rejecting this court's statement of Maryland law in *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987)).

Here, the underlying lawsuits seek an injunction to abate a nuisance, restitution, disgorgement of profits, civil penalties, attorneys' fees, costs, and contribution to a fund to monitor gun dealers. None of these remedies would repair or compensate for injuries sustained in the past by victims of gun violence. An injunction to abate a nuisance, specifically, one requiring changes in the methods of distributing and marketing firearms, is forward looking relief to prevent future

harm, not relief to redress past harm. Likewise, monies for a fund to monitor gun dealers are not costs of past injuries, nor are attorneys' fees and court costs. Civil penalties are fines payable to the government to punish and deter bad conduct, not payments of the costs of an injury or harm. In some cases, equitable relief in the form of restitution or disgorgement is used to restore damaged property or goods, as in the case of environmental cleanup, and thus the relief may fall within the ordinary meaning of "damages." *See Bausch & Lomb*, 625 A.2d at 1032-33 (environmental cleanup costs required by the government's restitutionary claims fall within the common usage of "damages"). Here, however, the gun makers' and distributors' revenue that would be subject to restitution and disgorgement would be paid into public treasuries. There is no indication that the funds would be paid to the victims of gun violence. Therefore, the restitution and disgorgement is not sought to compensate for or repair past injuries. All in all, because the underlying lawsuits do not seek "damages" in the ordinary sense, I concur in the judgment affirming the award of summary judgment to the defendant-insurers on the duty to defend claim.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1130, No. 00-2533

[Filed, April 23, 2001]

Ellett Brothers, Incorporated,
Plaintiff-Appellant,

v.

United States Fidelity & Guaranty Company; Fidelity and Guaranty Insurance Underwriters, Incorporated; St. Paul Mercury Insurance Company,
Defendants-Appellees,

and

International Insurance Company; RLI Insurance Company; Mount Hawley Insurance Company; United National Insurance Company,
Defendants.

American Insurance Association; National Shooting Sports Foundation; National Association of Independent Insurers,
Amici Curiae.

Ellett Brothers, Incorporated,
Plaintiff-Appellee,

v.

United States Fidelity & Guaranty Company; Fidelity and Guaranty Insurance Underwriters, Incorporated; St. Paul Mercury Insurance Company,
Defendants-Appellants,

and

International Insurance Company; RLI Insurance Company; Mount Hawley Insurance Company; United National Insurance Company,
Defendants.

American Insurance Association; National Shooting Sports Foundation; National Association of Independent Insurers,
Amici Curiae.

ORDER

Appellant has filed a motion for certification of questions of law to the South Carolina Supreme Court. The American Insurance Association, the National Association of Independant Insurers and the National Shooting Sports Foundation have filed motions for leave to participate as Amici Curiae and for leave to file responses to the motion for certification, with proposed responses. The National Shooting

Sports Foundation has also filed motion for leave to file a substitute disclosure form under seal. Appellees have filed responses to these motions.

The Court denies appellant's motion for certification of questions of law, grants the motions for leave to participate as Amici Curiae and accepts for filing the proposed responses. The Court denies the motion of the National Shooting Sports Foundation for leave to file substitute disclosure form under seal.

FOR THE COURT,

/s/ _____
Patricia S. Connor
CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

C.A. No. 3:00-1269-19

[Filed December 5, 2000]

Ellett Brothers, Incorporated, Plaintiff,	)
v.	)
United States Fidelity & Guaranty Company, Fidelity and Guaranty Insurance Underwriters, Inc.) St. Paul Mercury Insurance Company, International Insurance Company, RLI Insurance Company, Mt. Hawley Insurance Company, United National Insurance Company, Defendants,	)

ORDER

This case is before the Court on St. Paul's motion for summary judgment.[1] St. Paul seeks a declaration that, as a

[1] Consistent with the parties' memoranda, the Court's collective reference to "St. Paul" includes defendants St. Paul

matter of law, it has no obligation to defend plaintiff in four separate pending lawsuits.[2] After carefully reviewing the record and the controlling legal principles, the Court concludes that the motion should be granted.

"[T]he determination whether a liability insurance company is obligated to defend an action under the policy provisions is based on the allegations of the complaint. If the a leged facts in the complaint fail to bring the case within the policy coverage, the insurer is free of the obligation to defend."[3] Conversely, "[a] liability insurer must defend any suit alleging bodily injury or property damage seeking damages payable under the terms of the policy."[4] The dispositive issue here hinges on whether the relief sought in the underlying lawsuits constitutes "damages payable under the terms of the policy."

The applicable insurance contracts state in pertinent part that St. Paul will pay "those sums that [plaintiff] becomes legally obligated to pay as damages. . . . " In *Cincinnati*

Mercury Insurance Company, United States Fidelity & Guaranty Company, and Fidelity & Guaranty Insurance Underwriters, Inc.

[2] By prior Order, the Court permitted plaintiff to withdraw its request for indemnity without prejudice.

[3] *First Fin. Ins. Co. v. Sea Isl. Sport Fishing Soc'y, Inc.*, 490 S.E.2d 257, 258 (S.C. 1997) (citation omitted).

[4] *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 514 S.E. 2d 327, 330 (S.C. 1999).

Insurance Company v. Milliken and Company,[5] the Fourth Circuit interpreted the term "damages" in the context of South Carolina insurance law relating to liability policies and held:

> In the insurance context the word "damages" is not ambiguous. It means legal damages. As a general rule comprehensive general liability policies do not extend coverage to claims for equitable relief. We have no doubt that South Carolina law, in concert with Maryland and Missouri, would recognize that a general comprehensive liability policy which obligated the insurer to pay "all sums which the insured shall become legally obligated to pay as damages" would not cover claims for which the insured is equitably obligated to pay.

St. Paul contends, and the Court concludes, that under this interpretation of South Carolina law, *which the Court is bound to follow,* St. Paul does not have a duty to defend plaintiff in the four pending lawsuits because the relief sought in those cases is equitable in nature and, therefore, does not constitute damages.[6]

---

[5] 857 F. 2d 979, 981 (4th Cir. 1988) (citation omitted.)

[6] Although plaintiff argues that prayers for interest, costs, and attorneys fees create the possibility of an award of "damages," the Court finds this argument foreclosed by the "Supplementary Payments" provisions of St. Paul's contracts.

Without presenting any significant rationale, plaintiff argues at length[7] that the Court must reject the Fourth Circuit's interpretation of South Carolina law as expressed in *Cincinnati Insurance Company*.[8] However, and it really should go without having to be said, the Court is not at liberty to reject controlling precedent from the Fourth Circuit in such a cavalier manner.[9] On appeal, the Fourth Circuit will have ample opportunity to revisit *Cincinnati Insurance Company,* and that court may take whatever steps it deems appropriate concerning its own precedent. Until such time (if ever) that the Fourth Circuit overrules *Cincinnati Insurance Company* (or until there is some positive sign from the Supreme Court of South Carolina that *Cincinnati Insurance Company* incorrectly states the law), the Court will continue to apply the case as it has done here.

Based on the foregoing, the Court hereby **ORDERS** on this the 5th day of December, 2000, at Columbia, South Carolina, that the motion for summary judgment be **GRANTED**.

---

[7] The Court does not condone plaintiff's filing of 2 supplemental memorandums in opposition to the motion for summary judgment.

[8] Plaintiff has previously requested that the Court certify a question of law to the Supreme Court of South Carolina, thus allowing that court to review *Cincinnati Insurance Company*.

[9] This Court's duty to follow Fourth Circuit precedent is not diminished simply because the precedent involves an interpretation of state law. *See FDIC v. Abraham*, 137 F. 3d 254, 268-69 (5th Cir. 1998).

/s/ _____
DENNIS W. SHEDD
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C.A. No. 3:00-1269-19

[Filed October 25, 2000]

Ellett Brothers, Incorporated, Plaintiff,	)
v.	)
United States Fidelity & Guaranty Company, Fidelity and Guaranty Insurance Underwriters, Inc. St. Paul Mercury Insurance Company, International Insurance Company, RLI Insurance Company, Mt. Hawley Insurance Company, United National Insurance Company, Defendants,	)

DENIED

/s/_____ 10/25/00
Dennis W. Shedd Date
United States District Judge

MOTION FOR CERTIFICATION OF QUESTION OF LAW

Pursuant to Rule 228 of the South Carolina Appellate Court Rules, the plaintiff Ellett Brothers, Inc. hereby moves this Court for an Order certifying the following question of law to the South Carolina Supreme Court.[1] *S.C.R.C.P. 228.*

> Under South Carolina law, and the relevant insurance policies, do the claims asserted in the underlying complaints against Ellett Brothers constitute claims for "damages," thus creating the possibility of coverage and triggering the insurers' duty to defend?

The bases for this Motion are that this issue may be determinative of the action pending before this Court and there is no controlling precedent in the decisions of the South Carolina Supreme Court. Therefore, for these reasons, this issue should be certified to the South Carolina Supreme Court for review and interpretation.

---

[1] The procedure for certifying questions of law to a state's Supreme Court is governed by state law. *See Luck v. GSSW Ltd. Partnership*, 131 F. 3d 135 (4th Cir. 1997).

Supreme Court, U.S.
FILED
JUN 27 2002
CLERK

(2)

No. 01-1728

In the Supreme Court of the United States

ELLETT BROTHERS, INC.,
Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, INC., ST. PAUL MERCURY INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALTER J. ANDREWS
COUNSEL OF RECORD
LON A. BERK
MICHAEL S. LEVINE
SHAW PITTMAN LLP
1650 TYSONS BLVD.
MCLEAN, VA 20155
(703) 770-7900

JOHN E. JOHNSTON, JR.
LAUREL R.S. BLAIR
LEATHERWOOD WALKER
TODD & MANN P.C.
300 EAST MCBEE AVENUE
GREENVILLE, SC 29601
(864) 242-6440

Counsel for Respondents, United States Fidelity and Guaranty Company, Fidelity and Guaranty Insurance Underwriters, Inc., St. Paul Mercury Insurance Company

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

60 pgs

QUESTION PRESENTED

Petitioner, Ellett Brothers, Inc. ("Ellett Brothers"), a distributor of handguns, is a defendant in four lawsuits that seek to change the manner in which Ellett Brothers markets, sells and distributes handguns (the "Underlying Lawsuits"). Ellett Brothers tendered each of the four Underlying Lawsuits to its general liability insurers, including United States Fidelity and Guaranty Company, Fidelity and Guaranty Insurance Underwriters, Inc., and St. Paul Mercury Insurance Company (collectively "St. Paul"), seeking a defense and indemnification. The District Court for the District of South Carolina held that there was no duty to defend any of the Underlying Lawsuits because none of those suits sought "damages" as required by the material contracts for liability insurance. The Fourth Circuit affirmed.

The Petition raises the following issue:

> Did the Court of Appeals for the Fourth Circuit reversibly err in concluding that, under South Carolina law, sums paid by an insured to prevent future injuries are not "damages" under contracts for general liability insurance.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

I. THE UNDERLYING LAWSUITS 2

A. The Municipal Complaints 2

B. The NAACP Complaint 2

II. THE CONTRACTS FOR INSURANCE 3

III. THE CLAIM FOR COVERAGE 4

REASONS FOR DENYING CERTIORARI 5

I. THERE IS NO FEDERAL QUESTION OR CONSTITUTIONAL ISSUE 6

II. NEITHER THE DISTRICT COURT NOR THE FOURTH CIRCUIT VIOLATED *ERIE* 6

A. The Fourth Circuit Applied State Substantive Law, Not Federal Common Law 6

1. Braswell Establishes The "Default Rule" Expressed In Ellett 7

2. *Other Decisions Under South Carolina Law Further Confirm That The "Default Rule" In Ellett Is A Rule Of State Substantive Law* 11

CONCLUSION 14

APPENDIX

Appendix 1
Helena Chemical Co. v. Allianz Underwriters Ins. Co., No. 96-CP-03-43 (S.C. Ct. Common Pleas, Allendale County, March 28, 2001) 1b

Appendix 2
Scheper v. United States Fidelity and Guaranty Co., No. 90-CP-07-879 (S.C. Ct. Common Pleas, Beaufort County, October 29, 1991). . 26b

TABLE OF AUTHORITIES

Cases

Braswell v. Faircloth,
387 S.E.2d 707 (S.C. Ct. App. 1989)
. . . . . 7, 8, 9, 10, 11, 14

C.D. Spangler Constr. Co. v.
Indus. Crankshaft & Eng'g Co.,
388 S.E.2d 557 (N.C. 1990) 13

Cincinnati Ins. Co. v. Milliken,
857 F.2d 979 (4th Cir. 1988) 10, 13

Ellett Brothers, Inc. v. USF&G,
275 F.3d 384 (4th Cir. 2001) 6, 7, 9, 10

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 5, 6, 7, 14

Gooding v. Wilson,
405 U.S. 518 (1972) 8

Helena Chemical Co. v. Allianz Underwriters Ins. Co.,
No. 96-CP-03-43 (S.C. Ct. Common Pleas,
Allendale County, March 28, 2001) 11, 14

Maryland Casualty Co. v. Armco, Inc.,
822 F.2d 1348 (4th Cir. 1987) 13

Mraz v. Canadian Universal Ins. Co.,
804 F.2d 1325 (4th Cir. 1986) 13

Scheper v. United States Fidelity and Guaranty Co.,
No. 90-CP-07-879 (S.C. Ct. Common Pleas
Beaufort County, October 29, 1991) . . 12, 13, 14

Six Cos. of Cal. v. Joint Highway Dist. No. 13,
311 U.S. 180 (1940) 8

Spangler Const. v. Indus. Crankshaft,
388 S.E.2d 557 (N.C. 1990) 13

Stoner v. N.Y. Life Ins. Co.,
311 U.S. 464 (1940) 8

Other

Supreme Court R.10 6

RESPONDENTS UNITED STATES FIDELITY AND GUARANTY COMPANY, FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, INC., AND ST. PAUL MERCURY INSURANCE COMPANY'S BRIEF IN OPPOSITION TO ELLETT BROTHERS, INC.'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Ellett Brothers commenced this action against St. Paul and others, seeking a declaration that, pursuant to certain contracts for liability insurance, St. Paul is obligated to defend and indemnify Ellett Brothers with respect to four Underlying Lawsuits. [Petition p. 2]. The first three lawsuits (the "Municipal Complaints") have been consolidated and are pending in California state court. The fourth lawsuit, commenced by the NAACP, is pending in New York federal district court.

The district court awarded summary judgment in favor of St. Paul, finding that St. Paul was not obligated to defend Ellett Brothers in any of the Underlying Lawsuits because, under South Carolina law, contracts of general liability insurance do not cover claims for equitable relief aimed at preventing future injuries. [Pet'r App. pp. 20a – 24a]. The United States Court of Appeals for the Fourth Circuit affirmed that judgment, finding that under South Carolina law, the relief sought by the California municipalities and the NAACP does not constitute covered "damages," but rather, amounts only to equitable and prophylactic relief beyond the scope of Ellett Brothers' insurance. [Pet'r App. pp. 4a – 16a].

I. THE UNDERLYING LAWSUITS.

A. The Municipal Complaints.

The City of San Francisco, the City of Los Angeles, and the County of Los Angeles, commenced three lawsuits against Ellett Brothers and other gun manufacturers and distributors (the "Gun Industry Defendants"). These Municipal Complaints are based on substantially similar allegations. The Municipal Complaints allege that Ellett Brothers and other Gun Industry Defendants employ a distribution system designed to facilitate the acquisition of handguns by criminals, minors and others not authorized or intended to use, sell, or possess handguns.

The Municipal Complaints in general contain three causes of action. First, they allege that Ellett Brothers and the other Gun Industry Defendants' conduct created a continuing public nuisance. The Municipal Complaints each seek an abatement of the conduct that allegedly created and perpetuates this nuisance. The Municipal Complaints also contend that Ellett Brothers and other Gun Industry Defendants violated the California Business and Professions Code and unlawfully created and maintain public and private nuisances. Finally, the complaints by the County of Los Angeles and the City of San Francisco also contend that Ellett Brothers and other Gun Industry Defendants violated the California Business and Professions Code in connection with the marketing and sale of firearms. The municipalities do not seek any compensatory relief for these claims.

B. The NAACP Complaint.

Like the Municipal Complaints, the NAACP Complaint alleges that Ellett Brothers and other Gun Industry

Defendants created and maintain an allegedly illegal secondary market for guns. The NAACP Complaint requests injunctive relief, in the form of an order directing that each Gun Industry Defendant establish, implement, and enforce various mandatory safety measures. The only monetary demand in the NAACP lawsuit is a request for an order requiring the Gun Industry Defendants to institute and contribute to a fund for the education, supervision, and regulation of approximately 16,000 gun dealers. The NAACP does not seek compensatory relief. In fact, paragraph 63 of the NAACP Complaint explicitly states that it is not requesting legal damages.

II. THE CONTRACTS FOR INSURANCE.

At issue are fourteen contracts between Ellett Brothers and St. Paul for commercial general liability insurance, commercial umbrella liability insurance, and/or excess umbrella liability insurance (the "St. Paul Contracts"). The St. Paul Contracts state that St. Paul will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which the insurance applies" and provide that St. Paul will have the "right and duty to defend the insured against any 'suit' seeking those damages." [Petition p. 2]. The Contracts further provide, however, that "[n]o other liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A AND B." The St. Paul Contracts define "bodily injury" to mean "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." The St. Paul Contracts define "property damage" as " a. [p]hysical injury to tangible property . . . or . . . b. [l]oss of use of tangible property that is not physically injured."

The St. Paul Contracts also provide coverage for certain other amounts that Ellett Brothers might become obligated to pay. These other amounts are set forth expressly in the Contracts' Supplementary Payments provision. The Supplementary Payments provision provides coverage, "with respect to any claim or 'suit' we defend," for prejudgment and post-judgment interest, and costs and attorneys fees.

Likewise, the St. Paul Contracts provide coverage for personal injuries and advertising injuries as well as for medical payments. Those coverages, however, are not at issue in this appeal and no other coverage is afforded under the Contracts.

III. THE CLAIM FOR COVERAGE.

Facing the potential for a significant increase in business and operating costs in the event that the underlying plaintiffs prevail, Ellett Brothers tendered the Underlying Lawsuits to St. Paul and certain other general liability insurers seeking a defense and indemnification in each of those lawsuits. Coverage was denied because the Underlying Lawsuits seek only equitable and prophylactic relief, not "damages." Ellett Brothers then filed this lawsuit to determine the parties' respective rights and obligations under the applicable insurance contracts. Thereafter, Ellett Brothers moved the district court to certify to the South Carolina Supreme Court the question of whether the claims asserted in the four Underlying Lawsuits constitute claims for "damages" under the insurance contracts. On October 25, 2000, the district court denied that motion because the "damages" issue under South Carolina law was settled. [Pet'r App. pp. 25a – 26a]. Ellett Brothers then moved to dismiss its own claim for indemnification against St. Paul and Ellett Brothers' other insurers. The district court permitted both dismissals.

Thereafter, the district court awarded summary judgment in favor of St. Paul, finding that St. Paul was not obligated to defend Ellett Brothers in any of the Underlying Lawsuits because, under South Carolina law, contracts of general liability insurance do not cover claims for equitable relief aimed at preventing future injuries. [Pet'r App. pp. 20a – 24a]. That finding necessarily resolved all substantive issues remaining in the case.

The Fourth Circuit affirmed the judgment of the district court, finding that under South Carolina law, the relief sought by the California municipalities and the NAACP does not constitute covered "damages," but rather, amounts only to equitable and prophylactic relief beyond the scope of Ellett Brothers' insurance. [Pet'r App. pp. 4a – 16a]. Ellett Brothers petitioned for rehearing and rehearing *en banc*. Both petitions were denied. [Pet'r App. pp. 1a – 3a].

REASONS FOR DENYING CERTIORARI

Ellett Brothers contends that the Fourth Circuit failed to properly analyze and apply South Carolina law in light of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Ellett Brothers further contends that the Fourth Circuit ignored South Carolina law and instead created out of whole cloth a "default rule" of federal common law.[1] Ellett Brothers misreads the Fourth Circuit's opinion. A proper reading of

---

[1] Ellett Brothers' reference to a "default rule" is a reference to the Fourth Circuit's statement in *Ellett* that, absent evidence of the parties' intent to expand the definition of "damages" in a contract for general liability insurance to include amounts paid in equity, the Court will construe the term "damages," in accordance with South Carolina law, to mean legal damages only. *See Ellett Brothers, Inc. v. United States Fidelity & Guaranty Company*, 275 F.3d 384 (4th Cir. 2001).

that opinion illustrates that the Fourth Circuit appropriately applied South Carolina law as required by *Erie*. Certiorari, therefore, should be denied.

I. THERE IS NO FEDERAL QUESTION OR CONSTITUTIONAL ISSUE.

The only question raised by Ellett Brothers is one of state law. There is no federal question. There likewise is no constitutional issue, as Ellett Brothers concedes. [Petition p. 1]. This Court, therefore, only should exercise review if it finds that the Fourth Circuit misapplied the prevailing law of South Carolina. Sup. Ct. R. 10. There has been no such misapplication. Review, therefore, is not warranted.

II. NEITHER THE DISTRICT COURT NOR THE FOURTH CIRCUIT VIOLATED *ERIE*.

The Fourth Circuit's opinion in *Ellett* is consistent with and compelled by every known material decision under South Carolina law. Ellett Brothers, therefore, has not presented a compelling reason for this Court to exercise discretionary jurisdiction over this appeal.

A. The Fourth Circuit Applied State Substantive Law, Not Federal Common Law.

There is no misapplication of state law or violation of the federal court's duties and responsibilities under *Erie*. Ellett Brothers erroneously contends that the Fourth Circuit violated *Erie's* prohibition against the creation of federal common law. The Fourth Circuit in no way violated this rule. The Fourth Circuit followed what is self-evident upon a reading of relevant South Carolina case law – that South

Carolina's own courts have developed a body of state substantive law from which a "default rule" of contract interpretation can be gleaned.

The "default rule" cited by the Fourth Circuit in *Ellett* is nothing more than an expression of the present state of South Carolina law on the "damages" issue. A review of South Carolina decisions on that issue confirms this. Ellett Brothers' characterization of the rule applied in *Ellett* as a rule of federal common law is just wrong.

1. Braswell Establishes The "Default Rule" Expressed In Ellett.

For more than twelve years, courts of South Carolina have held that amounts paid by an insured that go to prevent future injuries, as opposed to compensating for actual injuries, do not constitute "damages" under contracts for liability insurance. Indeed, this is exactly what the South Carolina Court of Appeals held in *Braswell v. Faircloth*, 387 S.E.2d 707 (S.C. Ct. App. 1989), where the court distinguished amounts that the insured would pay to remediate damaged soil from amounts that the insured would pay to prevent the

contamination of other soil. *See Braswell*, 387 S.E.2d at 711.[2]

In *Braswell*, the South Carolina Court of Appeals affirmed a trial court's finding that monies spent to prevent future injuries or harm do not constitute "damages" under South Carolina law because "damages" are amounts paid as a result of actual injury or damage. *Braswell*, 387 S.E.2d at 710. In *Braswell*, the policyholder sought coverage for two things: (1) the cost of removing drums of chemicals to prevent them from spilling; and (2) the cost of cleaning up chemicals that already had spilled. *Id.* Coverage was afforded only for the costs associated with the latter. *Id.* at 711. No coverage was afforded for amounts necessary to prevent damage that had *not yet* occurred. *Id.* The *Braswell* court explained:

---

[2] *Braswell* is controlling authority on the "damages" issue under South Carolina law. Although *Braswell* is a decision from an intermediate appellate court, *Braswell* is precedential authority because the "damages" issue has not been addressed by South Carolina's highest court. Without a decision from the state's highest court, federal courts must abide by the decisions of intermediate state appellate courts barring convincing evidence to the contrary. *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 526 n.3 (1972) (noting that federal courts must follow holdings of state intermediate appellate courts); *Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464, 467 (1940) (affirming earlier holding that federal courts "must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently."); *Six Cos. of Cal. v. Joint Highway Dist. No. 13*, 311 U.S. 180, 188 (1940) (state law by an intermediate appellate state court must be accepted by federal courts in absence of convincing evidence that the law of the state is otherwise). There is no evidence to the contrary and, in fact, all other known material decisions from courts of South Carolina support *Braswell*. Moreover, Ellett Brothers concedes that *Braswell* is binding authority. [*See* Petition p. 22].

> The major portion of the judgment constituted costs for removal of stored waste. These stored wastes had not leaked. . . . These removal costs are preventative in nature. No damages have yet occurred. We agree with the trial court that these costs are not covered under a general comprehensive liability policy.

Id. at 710.

Ellett Brothers ignores this critical distinction. Indeed, the *unedited* relevant language from *Braswell*, which is quoted by Ellett Brothers only in piecemeal form [*see* Petition p. 21], plainly illustrates the distinction:

> Upon the facts of this case we find an occurrence causing property damage did result *but only* as to the spill of the 1000 gallons of chemicals and only as to the $6643.72 in damages directly related to the contamination of the land by this spill. *The other costs constituting the federal court judgment are not covered under the insurance policy.*

Id. at 711 (emphasis added.) Thus, of the more than $187,000.00 at issue in *Braswell*, the court found that only $6,643.72 actually constituted "damages" covered by general liability insurance. The remainder of the judgment was preventative and, thus, not covered.

The distinction recognized in *Braswell* is critical because it sets forth the basis for the rule enunciated by the Fourth Circuit in *Ellett*, that amounts paid to prevent future injuries are not "damages." Contrary to Ellett Brothers' contention, the district court's and the Fourth Circuit's

reliance upon *Cincinnati Ins. Co. v. Milliken*, 857 F.2d 979 (4th Cir. 1988) as the basis for that rule was fully consistent with South Carolina law, because the court in *Braswell* expressly confirmed that *Milliken* is a correct statement of South Carolina law with respect to amounts that are spent to prevent future injury. *See Braswell*, 387 S.E.2d at 711. Moreover, whether the Fourth Circuit erred in deciding *Milliken* (which it did not) is of no moment now, since that decision has since been ratified by *Braswell* as a correct prediction of South Carolina law. *Id.*

Braswell confirms, therefore, that costs that are preventative in nature are not "damages" in the context of general liability insurance under South Carolina law. *Braswell* further confirms and clarifies that the *Milliken* Court correctly predicted how South Carolina courts would view the distinction between amounts that compensate for past injury – "damages" – and amounts paid to prevent future injuries that have not happened, and may never happen. *Id.* at 711.[3]

---

[3] Concurring with the Fourth Circuit majority in *Ellett v. U.S. Fidelity & Guar. Co.*, Judge Michael recognized *Braswell's* clarification. As Judge Michael explained it, the issue under South Carolina law is not whether the underlying relief is labeled as legal or equitable, but whether the purpose of the relief is to compensate for past injuries. *Ellett*, 275 F.3d at 391 (Michael, J., concurring). Where the purpose is compensation for an actual injury, the relief may be covered; where it is to prevent future injury, it is not. *Id.* The distinction, however, between Judge Michael's view and the majority's view is a distinction without a difference in this case because, here, there is no coverage for the Underlying Lawsuits under either view. The Underlying Lawsuits do not seek legal "damages." They likewise do not seek compensation for past injuries. Either way, the lawsuits are not covered.

2. *Other Decisions Under South Carolina Law Further Confirm That The "Default Rule" In Ellett Is A Rule Of State Substantive Law.*

Braswell is not the only decision under South Carolina law that recognizes a distinction between legal "damages" and other amounts that an insured might become obligated to pay. Indeed, while *Braswell* may be the only reported decision from a South Carolina state court to address the "damages" issue under South Carolina law, two unreported decisions also provide resolute guidance as to how South Carolina courts interpret the term "damages" in the context of general liability insurance.

In *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, No. 96-CP-03-43 (S.C. Ct. Common Pleas, Allendale County, March 28, 2001) [Resp. App.1, p.1b], the Court reiterated that South Carolina law continues to distinguish, for purposes of general liability insurance coverage, amounts paid by a policyholder as compensation for an injury and amounts paid for some other purpose. In *Helena Chemical*, the court held that amounts spent by the policyholder to remediate a public harm were not "damages" covered under the policyholder's general liability insurance contract. *Helena Chemical*, slip op. at 8. The court reasoned that the unambiguous language of Helena's general liability insurance policies plainly illustrates that coverage is not available for every cost or expense that Helena might incur. *Id.* Rather, the obligation must be one to pay "damages" to a third party because of injury to that party. *Id.* Amounts paid by Helena because of the manner in which it ran its business do not satisfy those criteria. *Id.* The *Helena Chemical* court explained:

> The "as damages" or "for damages" language is consistent with the basic nature of these insurance policies. These policies are liability policies. They do *not* cover every cost or expense that a company may have to pay because the company must comply with the law. Businesses must absorb many such expenses on a daily basis during the course of operations. Rather, these policies cover liabilities for *damages* to third parties or to third-party property.
>
> There is a plain, ordinary and popular meaning to the term "damages." People understand that when a person pays "damages," they are paying them to another person on account of legal liability for harm to that person or their property.

Id. at 8-9 (emphasis in original).

In another unreported decision, the South Carolina Court of Common Pleas, Beaufort County, reached a similar conclusion finding that response costs under CERCLA were equitable in nature and, thus, not "damages." *Scheper v. United States Fidelity and Guaranty Co.*, No. 90-CP-07-879 (S.C. Ct. Common Pleas, Beaufort County, October 29, 1991). [Resp. App. 2, p.26b]. In *Scheper,* the Court awarded summary judgment to the insurer, finding that claims asserted against the policyholder for reimbursement of environmental response costs are not claims for "damages." *Scheper*, slip op. at 8. The court reasoned that, under South Carolina law, environmental response costs are equitable amounts, and thus not "damages" under a contract for general liability insurance. *Id.* In reaching that conclusion, the South

Carolina court cited with approval the Fourth Circuit's decision in *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), which was followed by *Milliken* and which held that a claim for environmental response costs was one for injunctive and other equitable relief, not for damages. *Id.* at 9. The *Scheper* court likewise approved of *Milliken, supra,* and *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986) (also holding that amounts paid in equity are not "damages"). *Id.*

Moreover, the *Scheper* decision expressly rejected decisions from other jurisdictions that fail to recognize the distinction between claims for damages and claims for other forms of relief – including, for example, *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 388 S.E.2d 557 (N.C. 1990), which is relied upon by Ellett Brothers in its Petition. [*See* Petition pp. 16, 19]. As *Scheper* explains, *Spangler* and much of the other foreign authority relied upon by Ellett Brothers is immaterial because South Carolina law on the "damages" issue is settled:

> This court is aware of decisions to the contrary. See, *e.g.*, *Spangler Const. v. Indus. Crankshaft*, 388 S.E.2d 557 (N.C. 1990). However, in South Carolina, the unambiguous term "damages" in the USF&G policies does not encompass coverage for response costs asserted by EPA in its claim against Plaintiffs. Therefore, USF&G has no obligation to defend or indemnify Plaintiffs in connection with the underlying claims in this case. Accordingly, the first basis of my decision granting summary judgment is that USF&G has neither coverage nor a duty to defend because cleanup costs incurred pursuant to CERCLA do not

> constitute covered "damages" under the policies at issue.

Id. at 11-12.

In sum, *Braswell, Helena Chemical*, and *Scheper* all demonstrate that, under South Carolina law, the term "damages," without more, does not include equitable or prophylactic relief. The federal "default rule" championed by Ellett Brothers, therefore, is a false characterization of South Carolina common law. The Fourth Circuit was correct. *Erie* has not been violated. No further review is required.

CONCLUSION

The Fourth Circuit correctly concluded that there is no coverage for the Underlying Lawsuits because they seek only equitable relief aimed at the prevention of future injuries. They do not seek "damages." Ellett Brothers' Petition, therefore, should be denied.

Respectfully submitted,

Walter J. Andrews
Counsel of Record
Lon A. Berk
Michael S. Levine
SHAW PITTMAN LLP
McLean, VA 22102
(703) 770-7900

John E. Johnston, Jr.
Laurel R.S. Blair
LEATHERWOOD WALKER
TODD & MANN P.C.
300 East McBee Avenue
Greenville, SC 29601
(864) 242-6440

Counsel for Respondents, United States Fidelity and Guaranty Company, Fidelity and Guaranty Insurance Underwriters, Inc., and St. Paul Mercury Insurance Company

APPENDIX 1

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 96-CP-03-43

STATE OF SOUTH CAROLINA
COUNTY OF ALLENDALE

HELENA CHEMICAL COMPANY,	)
	)
Plaintiff,	)
	)
v.	)
	)
ALLIANZ UNDERWRITERS	)
INSURANCE COMPANY, et al.	)
Defendants.	)
	)

ORDER GRANTING
SUMMARY JUDGMENT

This is an insurance coverage dispute arising out of pesticide contamination at three South Carolina pesticide facilities. The plaintiff is Helena Chemical Company ("Helena"), a pesticide seller and formulator. It is a named insured or additional insured under certain insurance policies

issued by the various defendant insurance carriers.[1] Helena seeks in this action to recover its own costs and expenses incurred primarily by hauling away and disposing of soil, contaminated with pesticide residues and chemicals, found on or immediately adjacent to its property. The defendant insurance companies have filed motions asking this Court to grant summary judgment on the following grounds:

1) That Defendants do not have a duty to defend Helena or to reimburse Helena for its out-of-pocket costs in cleaning up the contamination on and alongside its properties because Helena's costs of cleaning up the property are not sums that policyholder is legally obligated to pay "as damages," and therefore are not covered by these insurance policies;

2) That Defendants do not have a duty to indemnify or defend Helena because the policies exclude coverage for the pollution at issue;

3) That as to the Fairfax facility, Defendants do not have a duty to indemnify or defend Helena because Helena failed to provide them with timely notice regarding pollution problems at that site;

---

[1] Those companies are Insurance Company of North America (INA), ACE Property & Casualty Insurance Company (formerly CIGNA Property & Casualty Insurance Company, formerly known as Aetna Insurance Company) (ACE P&C), Central National Insurance Company of Omaha (as to certain policies issued through Cravens, Dargan, Pacific Coast, managing general agent) (Central National), and Company, Lexington Insurance Company, and Allianz Underwriters.

4) That Helena cannot maintain a claim for coverage against its excess level carriers because the excess policies' minimum attachment points cannot be reached given the costs that would be allocated to each year as required by *Joe Harden Builders v. Aetna Cas. & Sur. Co.*, 326 S.C. 231, 236, 486 S.E.2d 89, 91 (S.C. 1997) and *Spartan Petroleum Co. v. Fed. Mut. Ins.*, 162 F.3d 805, 811 (4th Cir. 1998);

5) That Defendants were not required to provide a defense to Helena because in connection with the cleanups at issue, there were no suits filed against Helena triggering an obligation to defend;

6) That Helena's bad faith claims must be dismissed because each of the Defendants had one or more reasonable bases for believing that they did not owe Helena coverage for its cleanup claims.

The parties have submitted lengthy briefs, supporting affidavits, deposition testimony and documents addressed to these motions. The Court heard extensive argument on the motions at a hearing on February 20, 2001.

Summary judgment is appropriate where the pleadings and tendered evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP. In determining whether the party opposing summary judgment has raised a triable issue of fact, the evidence should be viewed in the light most favorable to the nonmoving party. For the reasons set forth below, the Court finds that considering the evidence in the light most favorable to Helena, Helena has raised no triable issue and the Defendants are entitled to summary judgment on the first two motions,

which address the "as damages" language and the pollution exclusion. The issues raised by those motions are dispositive of the case, including the "bad faith" claim. Therefore, the Court finds it unnecessary to decide the Defendants' remaining summary judgment motions (3, 4, & 5 listed above).

FACTS

I. THE INSURANCE POLICIES

Helena Chemical Company is in the business of, among other things, formulating, packaging and selling pesticides. Helena is a named insured and additional insured under certain liability policies issued by Defendants, generally for one year periods, in the 1970s and 1980s. Some of these policies were first-layer primary policies; in many years, Helena or its parent company also had excess policies that sit in various layers above the primary policies.

The policies at issue are liability policies, as distinguished, for example, from first-party property damage policies, business risk policies or other kinds of policies that might specifically provide coverage for damages or costs incurred in connection with damages to one's own property. All of the policies at issue in this case contain the same general coverage description, requiring the insurance companies to reimburse only those sums that the policyholder owes or has paid "as damages." Specifically, each insurance policy specifies that the carrier will pay on behalf of the insured (or reimburse) those sums that the insured is legally obligated to pay *as damages* because of property damage.

The insuring agreement of several of the primary policies state that the carrier will:

> pay on behalf of the Insured all sums which Insured *shall become legally obligated to pay as damages* because of . . . property damage . . . to which this insurance applies, caused by an occurrence. . .

The insuring agreement of certain of excess policies states the matter similarly, specifying that the carrier agrees to pay:

> all sums which the Insured *shall be obligated to pay by reason of liability . . . for damages* . . . on account of property damage . . .

All of the policies also contain a provision expressly excluding coverage for pollution. Most of the policies state, with some minor variation, that they do not apply:

> to personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkaloids, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, release or escape is sudden and accidental.

Other policies, such as the London Market excess policies (and those that follow form to those policies), state that there is no coverage for personal injury, bodily injury or property damage caused by "seepage, pollution or contamination" unless that "seepage, pollution or contamination is caused by

a sudden, unintended and unexpected happening during the period of [the policy.]" These pollution exclusions, therefore, eliminate coverage for pollution unless the pollution falls within the exception to that general exclusion.

II. THE CONTAMINATION AND CLEANUP FOR WHICH HELENA SEEKS TO RECOVER ITS EXPENSES

Helena has operated at least three pesticide formulation and sales facilities in South Carolina – in Fairfax, Cameron, and Mayesville. Pesticide dust and liquid and related chemicals were ultimately found on and immediately adjacent to the sites. After contamination with the United States Environmental Protection Agency ("EPA") or the South Carolina Department of Health and Environmental Control ("DHEC"), Helena incurred costs cleaning up such contamination, primarily by arranging for the soil from the sites to be hauled away and disposed of at appropriate facilities. In this action, Helena seeks to recover from its liability insurers its out-of-pocket costs for that clean-up – an amount somewhat in excess of ten million dollars.

A. The Fairfax Site

The Fairfax site is located on 13.5 acres near Highway 321 South in Fairfax, South Carolina. Pesticide information began in approximately 1956 when Mitchell Insecticide moved its pesticide formulation operations to the site, including grinding and bagging the pesticides. The company formulated about 5 million pounds of dry pesticides per year until the company was sold to new owners in approximately 1962. Mitchell Insecticide continued formulating dry pesticides and expanded the facilities to formulate liquid pesticides. In approximately 1965, Blue Chemical Company

bought the business and continued its operations as its own business, formulating both dry and liquid pesticides. In approximately 1970, Helena formally merged with Blue Chemical Company. After the merger, Mr. Blue, a former principal of Blue Chemical, became an officer of Helena. Helena continued manufacturing pesticides at the site until 1978. Helena currently operates the facility as a retail sales outlet and warehouse for agricultural chemicals.

Environmental authorities of both the State of South Carolina, DHEC, and EPA began investigating the contamination at the site in the early 1980s. The record evidence shows that contaminated soil at the Fairfax site was found where routine loading and unloading of chemicals, pesticide formulation and waste disposal (*i.e.*, landfilling) took place. The Final Remedial Investigation Report prepared by Helena's environmental consultant, Environmental and Safety Designs, Inc., and submitted to the EPA, states that:

> Pesticide distribution in soils is strongly focused north and northwest of the liquid formulation building, a large building that was used for the formulation of liquid pesticides by the former operators. The formulation of liquid pesticides generates liquid wastes in the form of "washouts" of mixing vessels between chemical formulations. While current industry practice is to containerize these washouts for reuse, it is unlikely that this was done in the 1960s and early 1970s . . . Contamination distribution on the Site, both in soil and groundwater, strongly suggest [sic] the pipe discharge and direct discharges from the liquid formulation building.

Id. At page 6-1 (footnote omitted). A second site of pesticide contaminants was an area used as a landfill, a disposal location, at the site. *See id.* at page 6-2. Finally, the report states that a third source of the pesticides on the ground, closely related to the warehouse structures, was "fugitive emissions and losses associated with handling dry pesticides." *Id.*

Over a number of years, Helena communicated with DHEC and EPA about the pesticide contamination at the Fairfax site. In 1985, EPA began considering placing the site on the National Priorities List. EPA informed Helena in 1989 that it considered Helena to be responsible for contamination at the site under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), P.L. 99-499. As a result of DHEC and EPA involvement, Helena undertook to remove and dispose of the pesticide-contaminated soil at the site.

The total cost of these soil removal efforts at the site was approximately $9 million, most of which was for hauling away the contaminated soil from Helena's property for disposal, although the disposal also involved some soil along the boundary and in a bordering drainage ditch. In connection with the possibility of contaminated groundwater in a shallow aquifer under the property, Helena also began a "pump and treat" operation with associated costs of approximately $378,062. Finally, Helena paid the government $50,000 to obtain a "credit" for the replacement of wetlands in lieu of cleaning up wetlands found to be contaminated on and adjacent to its site. (Under certain circumstances, rather than clean up a wetland area, the

company can pay money toward purchase of replacement wetlands elsewhere).

Helena seeks to recover all these costs under the Defendants' insurance policies.[2]

B. The Cameron Site

The Cameron facility is located on U.S. 176 in Cameron, Calhoun County. It operated as an agricultural chemical formulation and distribution facility from the time it was built in approximately 1969 until the late 1970s. Raw materials were transported to the site by truck and rail. The record evidence shows that contaminated soil was ultimately found around the facility's formulation, storage, and loading/unloading areas.

DHEC informed Helena in 1994 that it considered Helena to be responsible under CERCLA for contamination at the site. Helena completed a removal and disposal of pesticide-contaminated soils in 1995. Helena spent about $1

---

[2] In addition, in connection with this site, Helena added to this case by its Second Amended Complaint a claim for coverage arising from two private lawsuits brought against Helena known as the *Hetrick* and *Barnes* suits. Those suits appear to allege, among other things, that the contamination from Helena's sites damaged the plaintiffs' property. Those suits have not proceeded very far. Because, unlike the clean up cost matters, *Hetrick* and *Barnes* are suits seeking damages, the primary insurance carriers have reimbursed Helena for its defense costs in those cases, subject to a reservation of rights. Those costs have been minimal thus far. At oral argument, Helena advised the Court that proceedings in those cases were effectively stayed until this Court decided these summary judgment motions.

million hauling away soil from this facility. It seeks to recover these costs under the policies.

C. The Mayesville Site

Helena's Mayesville facility is located on Highway 76 East in Sumter County. In 1995, DHEC allegedly found pesticide contamination in a ditch adjacent to the facility and asked Helena to initiate a remediation plan. Helena spent approximately $282,000 at Mayesville, virtually all of it the result of removing contaminated soil from the ditch. It seeks to recover these costs under the policies.

CONCLUSIONS

I. HELENA'S INVESTIGATION AND CLEANUP COSTS ARE NOT "DAMAGES" COVERED BY THE POLICIES

The first issue is whether Helena can recover the out-of-pocket expenses that it incurred in investigating and cleaning up the pesticide contamination on and around its property. In view of the plan and clear language of the insurance policies, the Court holds that it cannot.

As noted above, the insuring clause of the policies defines what the carriers are responsible to pay. It specifies that the carrier will pay those sums which the policyholder is, *inter alia*, obligated to pay "as damages" or "for damages" because of property damage covered by the policies.

The plain language of the insurance policies states that reimbursement is not available for every cost or expense of the policyholder, or even for every obligation for which a policyholder may be legally obligated "to pay" money. To

the contrary, coverage is available only for money that Helena is "legally obligated" to pay "as damages" or "for damages" on account of property damage. The "as damages" or "for damages" language is consistent with the basic nature of these insurance policies. These policies are liability policies. The do *not* cover every cost or expense that a company may have to pay because the company must comply with the law. Businesses must absorb many such expenses on a daily basis during the course of operations. Rather, these policies cover liabilities for *damages* to third parties or to third-party property.

There is a plain, ordinary and popular meaning to the term "damages." People understand that when a person pays "damages," they are paying them to another person on account of legal liability for harm to that person or their property. By way of illustration, the two private party lawsuits discussed above, brought by nearby landowners seeking money for alleged damage to their property, are lawsuits that could give rise to Helena owing money "as damages" or "for damages."

Conversely, people would *not* ordinarily understand that expenditures made by a business to take steps to comply with government health, safety or environmental regulations or directives, including the costs of cleaning up the pollution at one's own facilities, are "damages." Rather, people would understand such costs and expenses as the expense of doing business in a civilized society. People would not understand that a company that has to pay such costs to comply with government requirements is paying itself "damages." Those out-of-pocket costs simply are not paid as damages in response to some liability. This Court is bound to respect the plain, ordinary and popular meaning of the term "damages"

and to give the words of the insurance policy their proper meaning.

Helena argues that it spent money at the three sites because of a legal obligation. Helena argues that if it failed to comply with the government directives, it could have been liable for statutory penalties, including punitive damages, or that EPA would have cleaned up the sites itself. Helena argues that, as a result, its costs to clean up the site should be covered under the policies. The Court finds Helena's argument unpersuasive.

Government rules and regulations that require a landowner to perform some duty or to undertake such action may be costly. Moreover, if a company fails to do its duty it may have to pay penalties or be subject to other enforcement mechanisms. But that does not make the cost of complying with such requirements "damages." Where a company must clear its property of contaminants to meet government requirements, or to prevent contamination to others, it will necessarily incur costs. But whether the landowner cleans up its property as it goes along, or whether it waits for the government to tell it to do so, the out-of-pocket costs of complying with such a government mandate to clean up one's pollution are *not* "damages."[3] Helena cannot recover its out-

---

[3] The cases note that where the responsible party fails to comply with a cleanup direction, the EPA may step in and conduct the cleanup itself – and then obtain reimbursement from the responsible party. The cases finding that cleanup costs – known as response costs – are not "damages" do not distinguish between the direct cleanup costs and reimbursement of EPA, where EPA steps in. *Company Cincinnati Ins. Co. v. Milliken*, 857 F.2d 979 (4th Cir. 1988) (monies to be paid to reimburse government for its costs performing CERCLA cleanup are not "damages") and *Scheper v.*

of-pocket costs from its insurers under these policies. In fact, the concept of paying "damages" to oneself is anomalous.

These conclusions are consistent with South Carolina case law. The Court finds the reasoning of the *Scheper* case, decided in 1991, persuasive. *Scheper v. United States Fid. & Guar. Co.*, No. 90-CP-07-879 (C.C.P. Beaufort Cty., Nov. 1, 1991). In *Scheper*, the court declined to allow a manufacturer whose property had been placed on the National Priorities List to recover the costs of an EPA cleanup under insurance policies similar to these. The court held that the costs of the government-imposed cleanup actions, whether conducted by the government or by the policyholder, are *not* "damages" covered by the insurance policies.

The court in *Scheper* explained that the "insurer did not agree to pay "*all* sums which the insured shall become legally obligated to pay, but rather 'all sums which the insured shall become legally obligated to pay *as damages*.'" If the term "damages" were to be given "broad boundless connotations . . . then the term 'damages' in the contract . . . would become mere surplusage because any obligation to pay would be covered.'" *Id.* at 9 (citation omitted). Instead, the court ruled, "in South Carolina, the unambiguous term 'damages' . . . does not encompass coverage for response

---

United States Fid. & Guar. Co, No. 90-CP-07-879 (C.C.P. Beaufort Cty., Nov. 1, 1991) (same) with *Sangama Weston, Inc. v. National Surety Corp.*, No. 6:89-642-21 (D.S.C. Oct. 28, 1992) (insured's out-of-pocket expenses to meet government cleanup demands are not "damages") and *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990) (same). The basic legal obligation in both cases is first upon the responsible party to clean up the pollution, which is not a situation that involves covered damages.

costs asserted by EPA in its claim against the Plaintiffs." *Id.* at 11-12. As a result, the carrier had no duty to indemnify or defend the policyholder. *Id.*

In its order granting summary judgment to the insurance carrier, the court in *Scheper* cited the reasoning of the United States Court of Appeals for the Fourth Circuit in two cases where it considered whether cleanup costs were covered by the "as damages" provision. In *Cincinnati Ins. Co. v. Milliken*, the federal court applied South Carolina law to resolve whether CERCLA cleanup costs are covered under a comprehensive general liability policy, and found that "[i]n the insurance context the word 'damages' is not ambiguous. It means legal damages." 857 F.2d 979, 980 (4th Cir. 1988). In *Maryland Casualty Co. v. Armco*, 822 F.2d 1348 (4th Cir. 1987), the federal court emphasized that coverage is provided only for liability "as damages" on account of property damage. Cleanup efforts, required by the government or even undertaken by the government, are not "damages" legally payable to a specific person or persons. 822 F.2d at 1353-54.

In *Braswell v. Faircloth,* 387 S.E.2d 707 (S.C. Ct. App. 1989), the South Carolina Court of Appeals expressly followed the reasoning of the Fourth Circuit in *Milliken* and *Armco*. In *Braswell,* the policyholder was the *lessee* of certain property. The lessor sued the lessee seeking costs it had incurred in cleaning up its property at the government's direction. The Court of Appeals held that the property owner/lessor had suffered damages from property damage, in the amount of $6,643 in out-of-pocket expenses, which it sought to recover as damages from the lessee. Accordingly, the Court of Appeals allowed the *lessee* to recover those damages paid to the lessor under its insurance policy.

But the court went on to hold that the bulk of the cost incurred, primarily to avoid future damage to the property by removing various storage tanks from the site, was *not* damages from property damage, 387 S.E.2d at 719-11. The court noted that the "costs of complying with a government directive" to clean up one's property are simply not recoverable under an insurance policy that provides coverage for sums that the policyholder must pay "as damages." *Id.*

In reaching its conclusion, the Court of Appeals in *Braswell* explicitly recited and adopted the persuasive authority and reasoning of the Fourth Circuit in *Milliken*. The Court of Appeals noted that in *Armco* an "insurer was not obligated to defend or indemnify its policyholder under a comprehensive general liability policy where the underlying action was a suit by the federal government to seek compliance with the directives of regulatory agencies." 387 S.E.2d at 711. The Court of Appeals also explained that in *Milliken* "an insurer was not obligated to defend or indemnify its policyholder in a suit by the federal government to recover the response costs of removing hazardous wastes." 387 S.E.2d at 711. The Court of Appeals then specifically applied the principles described in those cases, denying the policyholder's request to recover certain costs based on the "authority of *Armco* and *Milliken*." *Id.*

Helena argues that *Braswell* actually supports its recovery in this case because the Court of Appeals did allow the policyholder - the lessee - to recover $6,643 from its insurance carrier. Helena has misread that case. The limited claim that the Court of Appeals found reimbursable in *Braswell* was an example of a typical third-party damages claim. Specifically, because the lessee had damaged the lessor's property, the lessor could sue the lessee and claim as *damages* the cleanup costs that the lessee had caused it to

incur. The amount that the lessee was obligated to pay the lessor as damages for property damage was recoverable by the lessee from *its* insurer. In other words, the Court of Appeals found an ordinary damages claim to be reimbursable under the policies. As the South Carolina Court of Appeals made clear, its ruling was an application of, and fully consistent with, the holding and reasoning of *Milliken* and *Armco*.

This Court recognizes the precedential authority of *Braswell* and finds the result in *Braswell* consistent with the plain and popular meaning of the words of the insurance policies. The Court also emphasizes that while it recognizes that *Scheper, Armco* and *Milliken* are not *binding* precedent, the reasoning set forth therein is persuasive. See also *Sangamo Weston Inc. v. National Surety Corp.*, Civ. A. No. 6:89-642-21, at 5-6 (D.S.C. Oct. 28, 1992) (costs to remove "contaminating waste pursuant to a directive of the United States" are not compensable under the third-party liability policies). In the face of this line of cases analyzing the South Carolina law over at least 10 years, and consistently finding cleanup costs are *not* to be "damages" in circumstances like these, Helena has offered no contrary South Carolina authority.[4]

---

[4] There are also cases outside of South Carolina supporting the proposition that "damages" as set forth in comprehensive general liability policies do not encompass government ordered cleanup costs. *See, e.g. Patrons Oxford Mut. Inc. Co. v. Marois*, 573 A.2d 16 (Me. 1990). In fact, other jurisdictions have drawn the same distinction made in *Braswell* between the costs of cleanup imposed as a government requirement, which are not recoverable, and the situation presented where one private party sues another to recover cleanup costs as an element of damages. *Compare City of Edgerton v. General Casualty Co.*, 517 N.W.2d 463 (Wis. 1994),

Finally, at oral argument, Helena said that it was possible that there would be additional claims filed against it in the future, including claims by third parties in which those third parties sought damages. If such claims emerge, they presumably would not be barred by the "as damages" provision. Each claim would have to be examined as it arises.

Accordingly, Defendants have neither a duty to indemnify nor a duty to defend Helena because the cleanup costs it incurred as a result of government regulations, directives or requirements are not "damages" recoverable under the policies. Helena's out-of-pocket costs in cleaning up these sites are not "damages" recoverable under these insurance policies. For all of the above reasons, this Court grants Defendants' Motion for Summary Judgment on Helena's Claim for Reimbursement of Cleanup Expenses.

II. THE POLLUTION EXCLUSION BARS COVERAGE FOR HELENA'S CLAIMS

The second issue reached by this Court is whether the pollution exclusions in the insurance policies bar Helena's claims. The Court concludes that they do.

---

cert. Denied, 115 S. Ct. 1360 (1995) (cleanup costs are not damages) *with General Casualty Company of Wisconsin v. Hills*, 561 N.W. 2d 718 (Wis. 1997) (private party suit to recover costs from the property holder is a suit for damages). This Court is also aware that courts in other jurisdictions have reached a different conclusion. However, in the Court's view, under South Carolina laws, the term "damages" in the insurance policies at issues is unambiguous an does not encompass coverage for a policyholder's investigation and cleanup costs.

All of the policies at issue contain provisions expressly excluding coverage for pollution unless the discharge, release or escape is sudden and accidental. The London Market excess policies (and those that follow form to those policies), state that there is no coverage for personal injury, bodily injury or property damage caused by "seepage, pollution or contamination" unless that "seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of [the policy]."

This case involves pollution at the three South Carolina sites. Pesticide contamination was found at the three sites where the formulating, loading and unloading of pesticides took place, as well as in a landfill area at the Fairfax site and in drainage ditches adjacent to Helena's properties. This contamination was the subject of the cleanups at issue. The pollution exclusion, therefore, applies unless the claims fall under the exception to the pollution exclusion. In *Greenville County v. Insurance Reserve Fund,* the South Carolina Supreme Court held that the word "sudden" in the pollution exclusion does not mean, abrupt, but does mean "unexpected." 443 S.E.2d 552, 553 (S.C. 1994).

The carriers provided evidence that various operations at the site, in the course of the grinding, formulation and unloading of pesticides, resulted in the discharge of pesticides onto the soil. In contrast, Helena provided no evidence whatsoever of any accidental or unexpected events producing the pollution at issue. In fact, Helena argued that *none* of its employees can recall seeing or hearing about any unexpected, unintended or accidental release of either the liquid pesticides or pesticide dust. The record shows that many current and former Helena employees, and the employees and owners of the predecessor companies, testified specifically that they

have no knowledge of *any* such events at the three facilities. Helena offered no evidence about the cause of the contamination. Instead, Helena would ask the jury to speculate about the cause of the pollution on the site and to conclude, based on conjecture, that the pollution at the site got there from some unidentified accident or unexpected event. In the absence of the tender of any evidence, Helena has, therefore, not met its burden on summary judgment of raising a factual issue on the applicability of the pollution exclusion as defined in *Greenville County*.[5]

---

[5] At oral argument, Helena said that the burden should be on the defendants to prove that the exception to the exclusion does not apply. This assertion is incorrect. The burden is on the carriers to show that the exclusion applies in the first instance; they have met that burden because the fact that this case involves pollution is conceded. The burden is then on the policyholder to show that the exception to the pollution exclusion applies. *See e.g., St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp.*, 26 F.3d 1195, 1199-1200 (1st Cir. 1994) (. . . "[T]he *insured* bears the burden in establishing that an exception to a pollution exclusion has been satisfied.") (emphasis in original); see also Ostrager & Newman, *Handbook on Insurance Coverage Disputes* (9th ed. 1998) § 10.02(a)(1) and additional cases cited therein (although it is generally the carrier's burden to show the applicability of an exclusion, it is the policyholder's burden to show the applicability of an *exception* to an exclusion, such as the "sudden and accidental" exception).

But even if the burden to produce evidence that the exception does *not* apply properly place was on the carriers, the carriers have met that burden by offering evidence of ordinary, expected releases of small amounts of pesticides as part of the routine operation of the facility. Helena has not introduced any contrary evidence showing that pollution was actually the product of unexpected, accidental events.

Moreover, this Court finds that even if the burden were on the insurance carriers to show that the discharges were *not* unexpected or *not* accidental, the carriers met that burden convincingly. Defendants provided evidence that pesticide contamination resulted from the incidental releases of pesticide during the routine operations of grinding pesticide into dust, loading, unloading, bagging and formulating pesticides. Defendants presented deposition testimony of several witnesses, Charles Hooks, Bobby Pace, James Blue, and William Mitchell, each of whom had significant involvement with the sites at different times throughout their history. Each of these witnesses acknowledged that small quantities of pesticide were discharged in the course of various routine pesticide operations. Mr. Pace testified that pesticides are released into the air in the process of grinding dry pesticides. Mr. Mitchell testified that there was escape during the bagging operations. Mr. Hooks and Mr. Blue testified that liquid pesticide was released onto the ground in small amounts in unloading liquid pesticides.

Defendants' submissions also included a report by Helena's own environmental consultants to EPA describing that some of the pesticide contamination in the soil at the Fairfax site was the product of "fugitive emissions associated with handling dry pesticides," as well as from other facts such as "pipe discharge and direct discharges from the liquid formulation building" and an area used as a landfill at the site. That report also observes in one respect that standards have changed over time so that releases of small amounts of pesticides – washouts – that might have been treated as routine or acceptable in the 1950s, 1960s and 1970s may not be acceptable under modern standards. The sites were in operation for many years. The expectable small releases of pesticides that contaminated the soil are not covered under the pollution exclusion. *E.g. Virginia Properties, Inc. v. Home*

Ins. Co., 74 F.3d 1131, 1134-35 (11th Cir. 1996). In light of the carriers' convincing presentation, Helena's failure to present evidence of an unexpected or accidental release of pollutants highlights that there is no triable issue of fact for a jury on this point.

Helena asserted that it had a policy requiring employees to be careful in handling pesticides. Moreover, Helena insists that if there were spills, its policy would require that they be cleaned up. As a factual matter, the fact that Helena had a general policy of care does not refute the testimony of various Helena officials and employees that there were, in fact, small releases of pesticides while Helena was operating the facilities. Moreover, the Helena "policy" did not pertain to the practices at the sites in the 1950s, 1960s, and in 1970, prior to Helena's presence there. The defendant carriers submitted evidence, however, that small, expected, routine releases of pesticides took place in the day-to-day processing of these pesticides at these sites throughout these earlier periods of use. The insurers are not disputing that if there were a spill of significance, that it might have been cleaned up (though Helena provided no evidence of such spills). Rather, the evidence offered by the carriers refers to the small releases of pesticides that were acknowledged by the witnesses to accompany operations.

Helena has taken the position that if it did not know what had taken place at the Fairfax facility before it started operations there, then any preexisting releases of pollutants could be "unexpected" by it. Specifically, Helena argued that

if it did not know that the landfill was there when it acquired the property, the landfill would be "unexpected" by Helena.[6]

Helena's argument is insufficient as a matter of law and somewhat misdirected as a matter of fact.

First, to clarify the issue as a factual matter, before 1970, all three sites were operated by Blue Chemical Company. The record shows that Helena entered into a formal merger with Blue Chemical Company in 1970, acquiring all of its assets and liabilities. As such, there does not seem to be any basis for Helena attempting to separate itself from the knowledge and practices of Blue Chemical, with which it merged. Mr. Blue was one of those who testified about the routine releases of small amounts of contaminants as part of the transfer of liquids at the sites. Moreover, with regard to the Fairfax facility, Blue Chemical purchased the business of Mitchell Insecticide in 1965. Helena would seem to be charged with the knowledge of all of its predecessors in interest. In addition, there was testimony of witnesses of continued routine discharges even after Helena took over.

Second, holding aside the factual problems with Helena's position, Helena is wrong legally. The pollution exclusion does not revolve around the particular policyholder's knowledge, but rather around whether the discharge was itself unexpected or accidental.

---

[6] Helena's argument in this regard focused on dumping at the landfill. Much of the pollution at the site was not related to the landfill. The site had been operated in the 1950s and through the 1960s as a pesticide formulation facility. The evidence showed that operations released pesticides onto the soil.

For its theory that it is not responsible for intentional or expected pollution by its predecessor, unless Helena knew of the pollution by the predecessor, Helena has called this Court's attention to *Horry County v. Insurance Reserve Fund,* 2001 WL 137617 (S.Ct. Ct. App. Feb. 20, 2001). That case did not involve a pollution exclusion, but rather a different provision of the insurance policies which defines an "occurrence." That provision of the insurance policy, the occurrence definition, makes the issue whether the accident was "expected [or] intended from *the standpoint of the insured.*" The provision quoted in *Horry* states that an "occurrence" is:

> an accident, including continuous or repeated exposure to conditions, which result[s] in personal injury or property damage neither expected *no intended from the standpoint of the insured.*

Id. at *3. The *occurrence* definition thus makes the issue whether the occurrence was expected from the vantage point of the insured. If this Court had been asked to apply the "occurrence" definition of the insurance policy, which it has not, Helena's argument that the pollution was not expected from its standpoint because it took place at the site before it came there might have some relevance.[7]

---

[7] Helena also tendered to the Court the opinion of an expert about how the pollution exclusion should be interpreted, arguing that prior intentional pollution could be an "accidental event in relation to the new owner." But Defendants called to my attention the fact that when the expert was asked in deposition about whether he was talking about the pollution exclusion or the occurrence definition, he stated that he was *not* referring to the pollution exclusion but was referring to the occurrence definition. Therefore,

That is not the case with the pollution exclusion, which is the provision of the insurance policy at issue here. The pollution exclusion asks whether the discharges were expected or accidental at all, not whether they were expected or accidental from the unique vantage point of the insured. The case law called to my attention by Defendants reflects the plain language of the policies on these points. *E.g., Powers Chemco Inc. v. Federal Ins. Co.*, 548 N.E.2d 1301, 1301 (N.Y. 1989); *Stamford Wallpaper Co., Inc. v. TIG Ins.*, 138 F.3d 75, 80 (2nd Cir. 1998). In *Powers Chemco*, the court rejected a policyholder's contention that since it was not the actual polluter, but merely inherited the problem from the prior landowner, the pollution exclusion clause could not bar its claim for cleanup costs. The court said: "Simply put, there is nothing in the language of the pollution exclusion clause to suggest that it is not applicable when liability is premised on the conduct of someone other than the insured." 548 N.E.2d at 1302. Similarly, in *Stamford Wallpaper*, the court rejected the argument that the pollution exclusion did not apply because another party did the dumping of wastes into a landfill, noting that the policies:

> clearly intended to exclude from coverage damages arising from the discharge of pollutants onto land, regardless of the nature of the discharge and regardless of whether the actual polluter was [the policyholder] or a third party, so long as the discharge was not 'sudden and accidental.'

---

even if the Court were to consider the statement of an "expert" construing the unambiguous meaning of the insurance policy, the opinion presented by Helena was not addressed to the proper point.

138 F.3d at 80. For all of the above reasons, this Court grants Defendants' Motion for Summary Judgment Based on The Pollution Exclusion in the Insurance Policies.

III. THE CARRIERS ACTED IN GOOD FAITH IN CONTESTING THE COVERAGE

In addition to its claim for coverage, Helena has also made a bad faith claim and claim for punitive damages. Under South Carolina law, the existence of a reasonable basis for denying or withholding coverage precludes a bad-faith claim. *Crossley v. State Farm Mut. Auto Ins. Co.*, 415 S.E.2d 393, 397 (S.C. 1992). I have found above that there was a more than reasonable basis – a meritorious basis – for denying coverage on the two grounds discussed above. This is sufficient to dismiss the bad faith claim. In addition, I find that each of the additional grounds asserted for denying or withholding coverage – which I have not had a need to resolve – was at least "reasonable" as a matter of law and also would preclude the bad faith claim.

THEREFORE, for the foregoing reasons, it is ORDERED that Defendants' Motion for Summary Judgment on Helena's Claim for Reimbursement of Cleanup Expenses, Defendants' Motion for Summary Judgment Based on the Pollution Exclusion in the Insurance Policies and Motion for Summary Judgment on the Bad Faith and Punitive Damages Claim are GRANTED, and judgment shall be entered for Defendants accordingly.

_____

JACKSON V. GREGORY
CIRCUIT COURT JUDGE

Beaufort, South Carolina
This ____ day of _____, 2001

APPENDIX 2

IN THE COURT OF COMMON PLEAS
CASE NO. 90-CP-07-879

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

F.W. SCHEPER, III, Individually and as a Trustee in Dissolution for Blake and Johnson Company, BLAKE AND JOHNSON COMPANY, and ELSIE WHITE, Plaintiffs,	)
v.	)
UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant.	)

ORDER GRANTING SUMMARY JUDGMENT

This matter comes before the court on Defendant's Motion for Summary Judgment. This is an insurance coverage dispute. The insureds, F. W. Scheper, III and Elsie White, former officers, directors and employees of the Blake and Johnson Company, and the Blake and Johnson Company, a dissolved Connecticut corporation (collectively referred to as Plaintiffs or Blake and Johnson Company), seek a

declaratory judgment that United States Fidelity and Guaranty Company (USF&G), as insurer, has a duty to defend and indemnify Plaintiffs under general liability policies for environmental damage claims made against them by the United States Environmental Protection Agency (EPA). Summary Judgment is appropriate where the pleadings, discovery, and evidence submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56, S.C.R.Civ.P. For the reasons set forth below, I find that there is no coverage for these claims and order that summary judgment be granted in favor of the insurer.

This action was commenced on May 14, 1990, by the filing of the Summons and Complaint. The Complaint alleges that the Blake and Johnson Company was a Connecticut corporation which has been dissolved under the laws of Connecticut and South Carolina; that the company was engaged in the business of manufacturing and delivering metal fastening devices in Beaufort County; that USF&G issued general liability insurance policies to Blake and Johnson between 1967 and 1977; that while the policies were in effect, Blake and Johnson released chemical and metal effluents into the environment; and that on June 1, 1989, Blake and Johnson was notified by the EPA that it had conducted a removal action at the site under the authority of Section 104 of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9604, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), P.L. 99—499. The Complaint alleges that USF&G has a duty to defend the Plaintiff against the EPA's claim and a contractual obligation to pay any judgment that might be rendered in connection with the EPA claim. The Complaint seeks a declaration by the court fixing the rights and obligations of the parties.

The underlying facts forming the basis of the EPA claim against the Plaintiffs are contained in the EPA Record obtained by Plaintiffs' counsel through an FOIA Request. This EPA record was received by this court as evidence in conjunction with this Motion for Summary Judgment without objection from either party. The facts are essentially undisputed. The documents indicate that from 1969 to 1980 Blake and Johnson discharged approximately 33,000-75,000 gallons of wastewater containing hazardous material per day into an unlined lagoon; that EPA began investigating the site in 1981; and that EPA added the Blake and Johnson site in Beaufort County to the National Priorities List on September 21, 1984. EPA has conducted studies disclosing the release and threatened release of Hazardous substance into the environment, resulting in remedial action consisting mainly of excavation of contaminated soils and sediments; solidification/stabilization of soils and sediments; backfilling; return of treated soils and sediments; vegetative cover over treated material; monitoring and maintenance; and institutional controls. Following completion of these remedial procedures, the EPA notified potentially responsible parties, including the three Plaintiffs in this suit; other, former officers and directors of Blake and Johnson Company who now reside out-of-state; and the current occupants of the site, the Independent Nail Company, of their potential liability for cleanup costs in excess of 1.6 million dollars plus additional, undetermined administrative costs, attorney's fees and interest.

In its Answer, USF&G set up various defenses, including certain policy defenses. USF&G has denied issuing the policies, and Plaintiffs themselves have been unable to produce them. Because the Plaintiffs are entitled to all favorable inferences at this stage of the proceeding, and because there is some secondary evidence in the record that

USF&G issued policies to Blake and Johnson during the years in question, the policies are deemed to have been issued for purposes of this motion only. It is undisputed that USF&G issued only standard Comprehensive General Liability Policies (CGL policies) and Comprehensive Excess Indemnity Policies (Excess policies) during the years in question. USF&G has asked the court to grant summary judgment on the following grounds, among others:

1) That USF&G has neither coverage nor a duty to defend because the underlying claim for environmental cleanup costs incurred by the Environmental Protection Agency does not constitute covered "damage" under the policies at issue;

2) that there is neither coverage nor a duty to defend because the pollution did not occur within the policy periods; and that there is not duty to defend because there is no "suit" which triggers the Defendant's duty to defend.

MATERIALS REVIEWED

In addition to the EPA record, the court has received and reviewed the following materials:

1) The pleadings;

2) the written discovery, including Interrogatories and Answers to Interrogatories, Requests for Production and Responses to Requests for Production, and Requests for Admission and Responses to Requests for Admission;

3) briefs of both parties, including Defendant's Memorandum in Support of Motion for Summary Judgment, Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, and Defendant's Reply Memorandum;

4) depositions of Donald F. Anderson, F. W. Scheper, III, John S. Woods and Russell Lee Beer;

5) standard policy forms for the years in question, all of which were duly authenticated by the deposition testimony;

6) correspondence from the EPA to the Plaintiffs concerning the underlying claim, all of which was duly authenticated by Requests for Admission;

7) a USF&G Department Circular dated 10-6-70;

8) USF&G Temporary Notice number 70-9 dated May 26, 1970.

All of this material was submitted to the court for purposes of this motion without objection by either party. In addition, the court has reviewed a wealth of case law from South Carolina and other jurisdictions dealing with the issue of insurance coverage for pollution under the terms and conditions of insurance policies such as those involved in the instant case.

THE INSURANCE POLICIES

The parties have been unable to produce the actual insurance policies issued by USF&G to the Blake and Johnson Company for the years in question. Accordingly, the parties have relied upon standard policy forms issued by USF&G during the years in question. Three witnesses have knowledge of the policy forms issued by USF&G. Two of these witnesses were Plaintiffs' witnesses: John S. Woods, a retired insurance agent for Citizens Insurance Company of Beaufort, and Russell Lee Beer, a former USF&G underwriter who has been an insurance agent to Citizens Insurance Company of Beaufort since 1970. Woods and Beer were involved with the issuance of the policies from USF&G to Blake and Johnson Company, Woods on the policyholder's end and Beer on the carrier's end. The third witness is Donald F. Anderson, a claims supervisor for USF&G in its Environmental Claims Department. Mr. Anderson is familiar with the policy forms currently possessed by USF&G for the years in question. In their depositions, these three witnesses have identified the standard policy forms which would have been issued by USF&G to Blake and Johnson Company. The testimony indicates that these policy forms were created by Insurance Services Organization (ISO), of which USF&G is and was a member, and that USF&G affixes the company logo to the basic ISO forms.

Plaintiffs claim that USF&G issued an underlying CGL policy and an Excess policy to the Blake and Johnson Company. The Complaint alleges that these policies were issued between 1967 and 1977. For these years, USF&G issued CGL policies with edition dates of October 1966 and January 1973. The relevant language contained in the two CGL policies is substantially the same. In the coverage Part, they provide:

The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of

A. bodily injury or

B. property damage

to which this insurance applies, caused by an occurrence, and the Company shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage, even if the allegations of the suit are groundless, false or fraudulent, and make such investigation and settlement of any claim or suit as it deems expedient. . . .

The standard Excess policies with edition dates of December 1967 and January 1973 provide, in relevant part:

INSURING AGREEMENTS

3.1 COVERAGE. The Company will indemnify the Insured for all sums which the Insured shall become obligated to pay as damages and expenses (all as defined herein and included within the term "ultimate net loss") by reason of liability imposed upon the Insured by law, or by contractual liability, because of

(1) personal injury or property damaged caused by, or

(2) advertising liability arising out of and occurrence which takes place anywhere.

The Excess policies do no contain the mandatory "duty to defend" provision as contained in the CGL policies. The Excess policies do provide:

5.3 INSURED'S DUTIES IN THE EVENT OF OCCURRENCE, CLAIM OR SUIT. The Insured shall be responsible for the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured which no underling insurer is obligated to defend.

5.4 DEFENSE; SETTLEMENT. When in the judgment of the Company an occurrence may involve damages in excess of the applicable underlying limit, the Company may elect at any time to participate with the Insured an with the underlying insurers in the investigation, settlement and defense of all claims and suits in connection therewith. After the exhaustion of any applicable limit of underlying insurance, the Company shall have the option to defend, at its own expense, any suit seeking to impose liability with respect to which insurance is afforded under this policy; and the Company may make such investigation and

settlement of any claim or suit as it deems expedient.

I. USF&G HAS NEITHER COVERAGE NOR A DUTY TO DEFEND BECAUSE CLEANUP COSTS INCURRED PURSUANT TO CERCLA DO NOT CONSTITUTE COVERED "DAMAGES" UNDER THE POLICIES.

As set forth above, coverage under the USF&G policies at issue in this action is limited in the Insuring clause to "all sums which the insured shall become legally obligated to pay as damages . . . because of . . . property damage caused by . . . an occurrence . . . ." (Emphasis added). Likewise, the Excess policies state that " 'damages' means all sums which the insured . . . becomes legally obligated to pay as damages . . . because of property damage . . . to which this policy applies." (Emphasis added).

The nature of the EPA claim is set forth in two notification letters sent by the EPA to the potentially responsible parties and the Close Out Report which is part of the material received pursuant to Plaintiffs' FOIA request and submitted without objection. The Close Out Report describes the remedial measures undertaken on page 6:

> The Operable Unit One Record of Decision (ROD) was signed on September 28, 1987 and outlined the following remedy for the soil contamination at the site:
>
> - Excavation of Contaminated soils and lagoon sediments.

- Solidification/stabilization of excavated soils and sediments.

- Backfilling of excavated lagoon sediments with a bottom layer of clean soil to two feet above the high water table.

- Return of treated soils and sediments to the lagoon at a level of approximately two feet above the high groundwater table.

- Vegetative cover of top soil and grass seed over treated material.

- Operation and Maintenance (O&M) activities of groundwater monitoring and maintenance of the vegetative cover.

- Institutional controls, such as fencing around the filled lagoon, and methods to ensure that future land uses are compatible with the selected remedy.

Construction activities at the size were initiated on March 28, 1988.

The remediation work was performed by an EPA ERCS contractor. EPA Region IV Emergency Response and Control Section personnel were responsible for design, oversight and monitoring of the work. Details

of the work are included in the OSC report for the site.

The Close Out Report further indicates that additional activities included clearing, sampling, dewatering, and debris disposal. Earlier activities included sampling and investigative procedures and the compiling of studies and reports, as set forth in another portion of the EPA record, the "First Operable Unit Remedial Investigation Report for Independent Nail Company Site Beaufort, South Carolina" dated June 8, 1987. On February 22 and March 1, 1990, EPA sent a letter to the Plaintiffs describing the activities for which EPA sought reimbursement:

> As a result of the release and threat of release presented to residents who were living in the area near the Site, in March, 1988, EPA began conducting a response which consisted of the removal and solidification of the hazardous waste from the lagoon.
>
> This response was undertaken pursuant to the authority of Section 104 of SERCLA, 42 U.S.C. Section 9601 et seq. The total response cost incurred to date by EPA in connection with the Site is approximately $1,693,130.87.
>
> Since Blake and Johnson were an owner/operator of the site during the time wastes were being placed in the lagoon, EPA hereby request that Blake and Johnson make restitution of costs incurred by the agency to date by payment of $1,693,130.08. EPA is currently tabulating additional response costs

> associated with the Site including, but not limited to, administrative costs, attorney's fees and interest. Therefore, EPA's total response costs are likely to increase.
>
> (Emphasis added).

The EPA claim does not include liability under 42 U.S.C. 9607(a)(4)(C) for "damages for injury to, destruction of, or loss of natural resource . . . ." (Emphasis added). Rather, the EPA seeks payment of response costs under 42. U.S.C. 9607(a)(4)(A)(B) incurred to remediate the site. Such claims seek equitable relief rather than damages. In South Carolina, response costs are not "damages" as set forth in the insurance policies at issue. Maryland Casualty Co. v. Armco, Inc., 822 F.2d. 1348 (4th Cir. 1979), cert. denied, 108 S. Ct. 703 (1988) (Maryland law) involved a suit brought by the United States against certain waste generators, including Armco, which alleged that improper maintenance techniques utilized in storing hazardous wastes resulted in the seepage of toxic chemicals into the soil and groundwater surrounding the site and surface flows off the site and onto adjoining property, thereby endangering persons and property. As in this case, the claim against Armco was brought pursuant to Section 107(a) of CERCLA seeking reimbursement for all investigatory and other response costs and enforcement activities related to the site and for the costs incurred or to be incurred in cleaning up the affected area. Applying Maryland law, the Fourth Circuit held that Armco was not entitled to coverage because the claim for injunctive and other equitable relief such as that south by the government under CERCLA does not constitute a claim for "damages" as defined in the policy's insuring agreement:

> The claim seeking compliance with the regulatory directive of a federal agency, which compliance takes the form of obedience to injunctions and reimbursement of remedial costs, does not constitute a claim for "damages" under the insurance policy.
>
> 882 F.2d at 1350.

In making it decision, the Fourth Circuit stressed the historical distinction recognized by the courts between "damages" on the one hand and "equitable relief" on the other. See, e.g., Aetna Casualty and Surety Co. v. Hanna, 224 F.2d at 503; Haines v. St. Paul Fire and Marine Ins. Co., 428 F. Supp. 435 (D.Md. 1977). In rejecting the policyholder's argument that the historical limitations applied by the courts to the term "damages" should be ignored, the Armco court observed that:

> It is a great step, and a dangerous one, for courts to begin to construe insurance policies to encompass costs of compliance with injunctive and reimbursement relief.
>
> 822 F.2d at 1353.

The Fourth Circuit also noted that its construction of the term "as damages" was consistent with the overall scheme of coverage set forth in the insuring agreement of the CGL policy. The insurer did not agree to pay "all sums which the insured shall become legally obligated to pay," but rather, "all sums which the insured shall become legally obligated to pay as damages":

> If the term "damages" is given . . . broad, boundless connotations . . . would become mere surplusage, because any obligations to pay would be covered. The limitation implied by employment of the phrase "to pay as damages" would be obliterated.
>
> 882 F.2d at 1352.

Finally, the Armco court observed that insurers have sound practical reasons for confining insurance coverage under liability policies to claims seeking legal "damages":

> Insurance policies, probably for reasons of certainty and economy, traditionally reimburse only damages arising from actual, tangible injury. Insurers are very reluctant to cover what are essentially prophylactic measures, such as safety precautions, for the obvious reason that such expenditures are subject to the discretion of the insured, and are not connected with any harm to specific third parties. Insurers require certainty as to the extent of their liability and this certainty is set forth in the insurance policy . . . .
>
> From an insurer's perspective, investigative and remedial actions taken by the government respecting potential environmental hazards constitutes a prophylactic measure. . . . . The government seeks to prevent or mitigate the occurrences or reoccurrences of hazardous contamination. The action is fundamentally prophylactic, and is not the sort that [insure] contracted to cover.

822 F.2d at 1353-1354.

The Fourth Circuit reaffirmed its Armco ruling in Cincinnati Ins. Co. v. Miliken and Co., 857 F.2 579 (4th Cir. 1988). Miliken was a case arising out of the United States District Court for the District of South Carolina in which the federal government had brought suit against generators of hazardous waste for recovery of cleanup costs pursuant to CERCLA Sections 9604 (a) and (b) and 9607 (a). The complaint alleged that waste had contaminated the soil and groundwater of a farm and that toxic compounds had been detected in neighboring wells. The prayer for relief was based on 42 U.S.C. Section 9607 (a)(1)-(4)(A) which empowers the government to sue for "all costs of removal or remedial action incurred by the Untied States." The waste generator was a CGL policyholder whose insuring clause was similar to that involved in this case. The Fourth Circuit held that although Armco and another case, Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986), had been decided under Maryland law, the result would be the same under South Carolina law:

> The meaning of Cincinnati's policy must be determined by application of South Carolina law. Nevertheless, the district court properly concluded that its decision should follow the reasoning of Armco and Mraz. We perceive no material distinctions between the South Carolina and Maryland laws in the construction and interpretation of insurance policies that should cause us to deviate from Armco and Mraz. Absent ambiguity, in South Carolina the language of an insurance policy is given its plain, ordinary, and popular meaning. (Citations omitted). Similarly, in Maryland

> words of an insurance contract are to be given their customary and normal meaning. (Citations omitted).
>
> In the insurance context the word "damages" is not ambiguous. It means legal damages. (Citations omitted). As a general rule comprehensive general liability policies do not extend coverage to claims for equitable relief. (Citations omitted). We have no doubt that South Carolina law, in concert with Maryland and Missouri, would recognize that a general comprehensive liability policy which obligated the insurer to pay "all sums which the insured shall become legally obligated to pay as damages" would not cover claims for which the insured is equitably obligated to pay.
>
> Although an insurance carrier's duty to defend is broader than the coverage it affords, for reasons adequately explained in Armco, 822 F.2d at 1264, Cincinnati was not obligated to defend the action brought by the Untied States.
>
> 857 F.2d at 980-981.

The Armco and Miliken decisions were cited with approval by the South Carolina Court of Appeals in Braswell, v. Faircloth, 387 S.E.2d 707 (Ct. App. 1989). There is substantial authority outside of South Carolina supporting the proposition that "damages" as set forth in the standard CGL policy do not encompass government ordered cleanup costs as well. Continental Inc. Co. v. Northeastern Pharmaceutical and Chemical Co., Inc., 842 F.2d 977 (8th Cir. 1988) (Missouri); A.J. Johnson and Co. v. Aetna Casualty and

Surety Co., 741 F. Supp. 298 (D.C. Mass. 1990) (Maine law); Verlan, Ltd. v. John L. Armitage and Co., 695 F. Supp. 950 (N.D. Ill. 1988) (Illinois); Hayes v. Maryland Casualty Co., 688 F. Supp. 513 (N.D. Fla. 1988) (Florida law).

This court is aware of decisions to the contrary. See, e.g., Spangler Const. v. Indus. Crankshaft, 388 S.E.2d 557 (N.C. 1990). However, in South Carolina, the unambiguous term "damages" in the USF&G policies does not encompass coverage for response costs asserted by EPA in its claim against the Plaintiffs. Therefore, USF&G has no obligation to defend or indemnify Plaintiffs in connection with the underlying claims in this case. Accordingly, the first basis of my decision granting summary judgment is that USF&G has neither coverage nor a duty to defend because cleanup costs incurred pursuant to CERCLA do not constitute covered "damages" under the policies at issue.

II. THE POLLUTION DID NOT OCCUR WITH THE POLICY PERIOD.

All of the policies at issue in this case require for coverage that property damage result during the policy period from an occurrence. The Coverage Parts for 1966 and 1973 CGL policies are similar:

> The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of property damage to which this insurance applies, caused by an occurrence . . . .

The 1966 CGL policy contains the following definition of "occurrence":

"occurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neigher expected nor intended from the standpoint of the Insured.

(Emphasis added).

The 1973 CGL policy contains the follwing definition of "property damage":

"property damage" means:

(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom.

(Emphasis added).

The 1967 Excess policy contains the following definition of "occurrence":

"occurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in personal injury or property damage neither expected nor intended from the standpoint of the Insured . .

(Emphasis added).

The 1973 excess policy contains the following definition of "property damage":

"Property damage: means:

(1) Physical injury to or destruction of tangible property which occurs during the policy period . . . .

(Emphasis added).

In hazardous waste cases in South Carolina, an occurrence is judged by which the injuries are first manifested. In Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986), the Fourth Circuit held that, under Maryland law, in hazardous waste burial cases, "an occurrence is deemed to take place when the injuries first manifest themselves." Mraz at page 1328. The court stated:

> The general rule is that the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when the complaining party was actually damaged . . . . Often, these cases involve a wrongful act that produces no harm for a period of time and then suddenly manifests itself in a burst of damage . . . . There are situations, however, in which the existence or scope of damage remains concealed or uncertain for a period of time even though damage is occurring. The leakage of hazardous wastes as in this case is a clear example. Determining exactly when damage begins can be difficult, if not impossible. In such cases, we believe that the better rule is that the occurrence is deemed to take place when the injuries first manifest themselves. . . .

804 F.2d at 1328.

Mraz applies in South Carolina pollution cases as well. Safeco Ins. Co. of America v. Mutual Inc. Co., No. 89-2822 (4th Cir. 1990) (affirming Judge Perry); Cincinnati Milliken and Co., supra.

Although Plaintiffs argue that contamination was discovered in 1975, the evidence indicates that the injuries were not manifested until after the USF&G policies expired in 1977. F.W. Scheper, III was employed by Blake and Johnson from 1975-1980 and served on its Board of Directors from 1976-1980. In his deposition, he testified that the company was small enough that he would have had knowledge of any environmental problems at the plant and that he was unaware of any pollution problems until 1980 when the company was about to be sold. The first hint of a contamination problem came in a letter from DHEC dated April 4, 1980. However, Mr. Scheper produced two letters from DHEC from June 1980 in which DHEC stated that groundwater evaluation yielded "favorable results," showing no lead in the groundwater and chromium at approximately the concentration of the drinking water standard with "little likelihood of finding serious contamination of groundwater". Basically, these letters gave Blake and Johnson a clean bill of health, and, accordingly, Blake and Johnson proceeded to sell the plant to Independent Nail. Furthermore, Mr. Scheper testified that Blake and Johnson had no contact with the EPA whatsoever until the company was dissolved in 1981. The Close Out Report (p. 3) confirms that EPA did not become involved at the site until February 26, 1981, at which time a "Potential Hazardous Waste Site Investigation Report and Preliminary Assessment Report" was prepared. That is when the injuries were manifested; that is when there was an occurrence. Therefore, USF&G is granted summary judgment on the ground that the pollution did not occur within the policy period.

II. THERE IS NO "SUIT" WHICH TRIGGERS USF&G'S DUTY TO DEFEND.

An additional ground for ruling that there is no duty to defend in this case is the fact that there is not suit to defend. The Excess policies create no duty to defend on the part of the insurer; consequently, any duty to defend must arise under the terms of the CGL policies. As noted above in the discussion of the insurance policies, the CGL policies require the insurer to defend any "suit" against the insured. In this case, Mr. Scheper has testified that no lawsuit has been filed by the EPA, nor has the EPA issued any administrative orders directed at the Plaintiffs, and that the extent of the EPA's notification is limited to correspondence to the Plaintiffs from the EPA. This correspondence is neither a suit nor an administrative order. The letters from EPA to the Plaintiffs provide that:

> Since Blake and Johnson were an owner/operator of the site during the time wastes were being placed in the lagoon, EPA hereby requests that Blake and Johnson make restitution . . . . EPA is currently tabulating additional response costs associated with the Site including, but not limited to, the administrative cost, attorney's fees and interest. Therefore EPA's total response cost. Should Blake and Johnson, as the responsible party want to discuss it s liability with the EPA, please contact the person named below in writing not later than fifteen (15) days after receipt of this letter. Absent such contract, the Agency will assume that 'Blake and Johnson have declined to reimburse the Fund for the

> Site expenditures, and may file suit in federal court to recover its response costs.
>
> (Emphasis added).

The relief requested in Plaintiff's Complaint includes a demand for defense of the EPA's "claim" (Complaint paragraph 7 and prayer for relief). However, the policy provides for defense of a "suit," and there is no "suit" to defend. It is firmly established under South Carolina law that general rules of contract construction apply equally to insurance policies. Gambrell v. Travelers Ins. Cos., 310 S.E.2d 814 (1983); Sloan Construction Co. v. Central Nat'l. Ins. Co. of Omaha, 236 S.E.2d 818 (1977); Thompson v. Continental Inc. Cos., 351 S.E.2d 904 (Ct. App. 1986). Where the policy language in the contract of insurance is plain and unambiguous, the court must give effect to that language. Torrington Co. v. Aetna Casualty and Surety Co., 216 S.E.2d 547 (1975). Policy language must be given a plain, ordinary, and popular meaning. Braswell v. Faircloth, 387 S.E.2d 707 (1989). Policy language should not be tortured in order to extend or defeat insurance coverage that was never intended by the parties. Gambrell v. Travelers Ins. Cos., supra. In South Carolina, there is no duty to defend absent a lawsuit:

> Both the obligation to indemnify and the obligation to defend are inchoate, conditional, contingent obligations to the insured. Before they come into play there must be an external event within the coverage of the policy and the performance of all conditions percendent by the insured, including his cooperation. There is no obligation to defend until an action is brought and no obligation to indemnify until a judgment against the insured is obtained.

Howard v. Allen, 176 S.E.2d 127, 129 (1970).

(Emphasis added).

Courts from other jurisdictions which have considered this question have held that claims and demands by governmental agencies are not "suits" within the meaning of insurance policies, and therefore do not trigger an insurer's duty to defend. Ryan, Klimek, Ryan Partnership v. Royal Insurance Company, 728 F. Supp. 862 (D.R.I. 1990) (New York law); Arco v. Traveler Insurance Company, 730 F. Supp. 59 (W.D. Mich. 1989; Harter Corp. v. Home Indemnity Co., 713 F. Supp. 213 (W.D. Mich. 1989); Aetna Casualty and Surety Co. v. Gulf Resources and Chemical Corp., 709 F. Supp. 958 (D.C. Idaho 1989).

The plain language of the policy and decisional authority of this state and other jurisdictions require that a suit be filed before an insurer's duty to defend its insured arises. Because the demands made by the EPA are not equivalent to the filing of a suit, USF&G has no contractual duty to defend the Plaintiffs in this case. Therefore, I grant summary judgment in favor of USF&G on the duty to defend issue on the additional ground that USF&G has no duty to defend the Plaintiffs at this time because there is no contractual duty to defend at this point without an EPA suit. It is, therefore,

Ordered that summary judgment is granted in favor of the Defendant, United States Fidelity and Guaranty Company, on the following grounds:

1. USF&G has neither coverage nor a duty to defend because cleanup costs incurred pursuant to CERCLS do not constitute covered "damages" under the policies;

2. USF&G has neither coverage nor a duty to defend because the pollution did not occur within the policy period;

3 USF&G has no duty to defend because there is not "suit" which has been filed which triggers USF&G's duty to defend.

AND IT IS SO ORDERED!

_____

THOMAS KEMMERLIN, JR.
SPECIAL CIRCUIT COURT JUDGE

Beaufort, South Carolina

This _____ day of _____, 1991.

(3)

Supreme Court, U.S.
FILED
JUL 10 2002
OFFICE OF THE CLERK

No. 01-1728

In the
Supreme Court of the United States

ELLETT BROTHERS, INC.,
Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, INC.,
ST. PAUL MERCURY INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

THORNWELL F. SOWELL III
Counsel of Record
SOWELL GRAY STEPP
& LAFFITTE, L.L.C.
1310 GADSDEN STREET
COLUMBIA, SC 29201
(803) 929-1400

AMY HOWE
GOLDSTEIN & HOWE, P.C.
4607 ASBURY PLACE, N.W.
WASHINGTON, D.C. 20016
(202) 237-7543

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

13 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY FOR THE PETITIONER 1

I. Respondents' Brief in Opposition Rests on a Mischaracterization of the District Court Opinion and Dicta in the Majority Opinion. . . . 2

II. In Reality, Respondents Defend Judge Michael's Concurring Opinion, Which Expressly Disagrees With the District Court and the Majority's Reliance on *Milliken* 4

III. Judge Michael's Rejection of the Majority's Reliance on *Milliken* Is Not "a Distinction Without a Difference." 7

IV. Allowing the Majority's Opinion to Stand Would Set a Dangerous Precedent for Fourth Circuit Law. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Braswell v. Faircloth,
387 S.E.2d 707 (S.C. Ct. App. 1989) . . . . *passim*

Cincinnati Insurance Co. v. Milliken,
857 F.2d 979 (4th Cir. 1988) . . . . . *passim*

Devlin v. Scardelletti,
265 F.3d 195 (4th Cir. 2001),
rev'd, 122 S. Ct. 2005 (2002) 8

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) 7,9

Helena Chemical Co. v.
Allianz Underwriters Insurance Co.,
No. 96-CP-0343 (S.C. Ct. Common Pleas,
Allendale County, Mar. 28, 2001) 4

Scheper v. U.S. Fidelity and Guaranty Co.,
No. 90-CP-07-879 (S.C. Ct. Common Pleas,
Beaufort County, Oct. 29, 1991) 4

Other

Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992) 9

REPLY FOR THE PETITIONER

Respondents contend that review by this Court is not warranted because both the district court and the majority opinion in the court of appeals correctly apply South Carolina law to determine that respondents are not obligated to defend the four lawsuits for which petitioner seeks coverage and indemnification. However, respondents' characterization of those opinions attributes to them a holding not actually reflected in either opinion, as neither the district court nor the majority made any meaningful attempt to discern – much less apply – South Carolina law.

To the extent that respondents claim that the result below is defensible insofar as it is consistent with South Carolina law as articulated in *Braswell v. Faircloth*, 387 S.E.2d 707 (S.C. Ct. App. 1989), respondents actually rest their defense not on the majority opinion, but instead on the *concurring* opinion of Judge Michael, who expressly *disagrees* with the majority's reliance on *Cincinnati Insurance Co. v. Milliken*, 857 F.2d 979 (4th Cir. 1988), and the default rule purportedly established therein. Moreover, respondents' attempt to explain away the discrepancies between Judge Michael's concurrence and the majority opinion as a "distinction without a difference" wholly misses the point of the Question Presented, as Judge Michael's concurrence – by seeking to discern and apply South Carolina law – does precisely what the majority does not.

Finally, the majority's failure to discern and apply South Carolina law sets a dangerous precedent for Fourth Circuit law, as the majority's reliance on the "default rule" allegedly established in *Milliken* has led to a disparity between state and federal courts with regard to South Carolina law.

I. Respondents' Brief in Opposition Rests on a Mischaracterization of the District Court Opinion and Dicta in the Majority Opinion.

Respondents attempt to defend the judgment below by asserting that both the district court and the majority opinions correctly apply South Carolina law and, based on this correct application, conclude that respondents are not obligated to defend the lawsuits for which petitioner seeks coverage and indemnification. Specifically, respondents – not once, but twice – describe the district court opinion as holding that "contracts of general liability insurance do not cover claims for *equitable relief aimed at preventing future injuries*." Brief in Opposition [hereinafter "BIO"] 1 (citing Pet. App. 20a-24a) (emphasis added); *see also id.* at 5 (explaining that "the district court awarded summary judgment in favor of St. Paul, finding that St. Paul was not obligated to defend [petitioner] . . . because, under South Carolina law, contracts of general liability insurance do not cover claims for *equitable relief aimed at preventing future injuries*" (citing Pet. App. 20a-24a) (emphasis added)). Similarly, respondents describe the majority opinion in the court of appeals as relying on *Milliken* to "enunciat[e]" a "rule . . . that amounts paid *to prevent future injuries* are not 'damages.'" *Id.* at 9 (emphasis added).

Unfortunately for respondents, the Brief in Opposition imputes to the district court and majority opinions a holding not actually reflected in either. Even a cursory review of both opinions reveals that the opinions rely solely on the "default rule" – allegedly established in *Milliken* – that the term "damages," as used in an insurance contract, includes only legal damages and excludes claims for equitable relief from coverage.

The district court's opinion, which relies completely on *Milliken*, holds only that respondents do "not have a duty to defend [petitioner] in the four pending lawsuits *because the relief sought in those cases is equitable in nature and, therefore, does not constitute damages*." Pet. App. 22a (emphasis added). Contrary to respondents' unequivocal description, the district court opinion thus makes absolutely no reference to the possibility that insurance contracts might in some circumstances cover claims for equitable relief, much less articulates a holding that might include some forms of equitable relief while excluding "amounts paid to prevent future injuries" (BIO 9).

The majority opinion explicitly holds only that "the term 'damages,' as used in [petitioner's] contract, does mean legal damages only, *and therefore does not extend to claims for equitable relief*." Pet. App. 8a (emphasis added). To be sure, having articulated this clear rule, the majority does note – in its discussion of "whether the four lawsuits against [petitioner] seek *legal damages*" (Pet. App. 8a (emphasis added)) – that none of the suits "seek compensation for past injuries" (Pet. App. 9a). However, in light of the majority's explicit legal/equitable distinction, the majority's passing statement in this context is more appropriately characterized as dicta, and certainly does not constitute a holding, in reliance on *Milliken*, that "amounts paid to prevent future injuries are not 'damages.'" *Contra* BIO 9-10. First, contrary to respondents' assertions regarding the majority's reliance on *Milliken* here, the majority could not have relied on *Milliken*, which made no such distinction between compensation for past and future injuries, to reach such a holding. *See* 857 F.2d at 981 (holding, without more, that "comprehensive general liability policies do not extend coverage to claims for equitable relief"). Indeed, the majority opinion cites *Milliken* in this Part only for the proposition that

restitution is an equitable remedy and therefore does not constitute "legal damages" for purposes of insurance coverage. *See* Pet. App. 9a. Second, and perhaps even more significantly, Judge Michael's concurring opinion – which, as discussed in greater detail below, holds that the lawsuits against petitioner did not constitute "damages" because the suits did not seek compensation for past injuries (Pet. App. 15a) – specifically declines to join not only Part I of the majority's holding, with regard to the legal/equitable distinction, but also Part II, which contains the very language cited by respondents as supporting the majority "rule" (Pet. App. 11a).

II. In Reality, Respondents Defend Judge Michael's Concurring Opinion, Which Expressly Disagrees With the District Court and the Majority's Reliance on *Milliken*.

As noted above, respondents' entire defense of the district court and majority opinions rests on the idea that those opinions correctly apply South Carolina law as articulated in *Braswell*, and based on this application hold that petitioner was not entitled to coverage or indemnification because the claims against it sought only equitable relief aimed at preventing future injuries.[1]

---

[1] To the extent that respondents rely on other unreported South Carolina cases, such as *Helena Chemical Co. v. Allianz Underwriters Insurance Co.*, No. 96-CP-0343 (S.C. Ct. Common Pleas, Allendale County, Mar. 28, 2001) (BIO App. 1b-25b), and *Scheper v. U.S. Fidelity and Guaranty Co.*, No. 90-CP-07-879 (S.C. Ct. Common Pleas, Beaufort County, Oct. 29, 1991) (BIO App. 26b-49b), such reliance is similarly unavailing because the cases neither support the holding attributed by respondents to the majority nor – contrary to respondents' claim – provide any additional "guidance" regarding South Carolina courts'

However, an examination of the holding that respondents seek to defend reveals that respondents actually appear to be defending Judge Michael's *concurring* opinion. On the one hand, it is understandable that respondents might attempt to ally themselves with Judge Michael's concurring opinion, as Judge Michael (unlike the majority) undertakes a careful effort to discern South Carolina law and, based on his interpretation of the decision of the South Carolina Court of Appeals in *Braswell*, ultimately concurs in the result reached by the majority – that petitioner is not entitled to coverage. On the other hand, respondents' defense of Judge Michael's concurrence is nothing short of remarkable, as Judge Michael expressly *disagrees* with the majority on the very subject that is at the heart of the Question Presented: the *majority's* failure to discern and apply South Carolina law, relying instead on *Milliken* and the default rule purportedly established therein. *See* Pet. App. 12a.

Notwithstanding respondents' extensive discussion of *Braswell* in an effort to defend the decisions below, the majority opinion refers to *Braswell* only in passing (*see* Pet. App. 7a (erroneously citing *Braswell* as supporting *Milliken*'s holding that "[a]s a general rule comprehensive general liability policies do not extend coverage to claims for equitable relief" (alteration in original))). Instead, the majority relies almost exclusively on the Fourth Circuit's earlier decision in

---

interpretation of the term "damages." Rather, both cases – which cite *Milliken* approvingly – merely hold that clean-up costs incurred to comply with government regulations are not "damages" covered under the relevant policies. *See* BIO App. 17b; *id.* 41b-42b. Indeed, neither opinion distinguishes between amounts paid to prevent future injuries and amounts paid to compensate for past injuries, as both cases involve attempts to recover costs incurred to clean up environmental damage *that had already occurred*. *Id.* 6b-10b; *id.* 27b-29b.

Milliken, in which the court of appeals – based on decisions interpreting Maryland and Missouri law – *predicted* that South Carolina courts would interpret the term "damages" so as to exclude claims for equitable relief. *See* 857 F.2d at 981 ("*We have no doubt that South Carolina law . . . would recognize* that a general comprehensive liability policy which obligated the insurer to pay 'all sums which the insured shall become legally obligated to pay as damages' would not cover claims for which the insured is equitably obligated to pay." (emphasis added)).

As Judge Michael's concurring opinion specifically acknowledges, however, the majority's blind reliance on the Fourth Circuit's thirteen-year-old holding in *Milliken*, without more, is inappropriate insofar as "South Carolina law . . . has not remained static since 1988" (Pet. App. 11a): "To the extent that South Carolina case law deviates from or contradicts our holding in *Milliken*, we must defer to the courts of South Carolina" (*id.* 12a). Judge Michael thus engages in a careful analysis of South Carolina law – an analysis, although in direct conflict with the majority opinion, with which respondents now seek to ally themselves – and, based on his analysis, concludes that "the ultimate holding in *Braswell*" – far from supporting the majority opinion, as both the majority and respondents contend – "appears to conflict with *Milliken*'s legal/equitable distinction." *Id.* 12a. Later in his opinion, Judge Michael describes the conflict in stronger terms, noting that "*Braswell* in effect rejects *Milliken*'s categorical rule excluding equitable relief from the term 'damages' because *Braswell* awarded coverage for environmental cleanup costs that the trial court had characterized as equitable relief." *Id.* 14a.

III. Judge Michael's Rejection of the Majority's Reliance on *Milliken* Is Not "a Distinction Without a Difference."

While expressly rejecting the majority's reliance on *Milliken* (and while noting its disagreement with the majority's failure to meaningfully discern and apply South Carolina law), Judge Michael nonetheless concludes that, although South Carolina law would award coverage for "equitable" relief in some circumstances, here petitioner is not entitled to coverage because none of the lawsuits against petitioner "sought [relief] to compensate for or repair past injuries" (Pet. App. 16a). In a footnote, respondents thus attempt to explain away the substantial discrepancy between the majority opinion, which relied on the legal/equitable distinction articulated in *Milliken*, and Judge Michael's concurrence, which specifically noted that the "default rule" on which the majority relies had been severely undermined, as "a distinction without a difference in this case because . . . there is no coverage for the Underlying Lawsuits under either view." BIO 10 n.3.

To the contrary, however, the distinction between the majority opinion and Judge Michael's concurring opinion is essential to the Question Presented, which ultimately seeks review of the majority's failure, contrary to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to make any meaningful attempt to discern and apply South Carolina law. That Judge Michael – based on his analysis of South Carolina law – would have reached the same result as the majority opinion with regard to the availability of coverage for petitioner is of absolutely no relevance. Rather, if certiorari is granted, the court of appeals can consider on remand whether, when South Carolina law – as reflected in cases such as *Braswell* – is properly discerned and applied, the underlying relief warrants coverage.

Indeed, petitioner's case is on all-fours with *Devlin v. Scardelletti*, 265 F.3d 195 (4th Cir. 2001), *rev'd*, 122 S. Ct. 2005 (2002), in which Judge Michael concurred in part and concurred in the judgment. He disagreed with the majority's holding that an objecting class member who does not intervene lacks standing to appeal a settlement order, but he agreed with the result reached by the majority, explaining that in any event he would sustain the district court's decision to approve the settlement on the merits. *See* 265 F.3d at 213-16. In their Brief in Opposition to the Petition for Certiorari in that case, the respondents argued that certiorari was not warranted because – based on the majority opinion and Judge Michael's concurrence – "the ruling would have no practical effect on the final disposition of this controversy." No. 01-417, BIO 11 (filed Nov. 7, 2001). Notwithstanding the respondents' arguments, this Court granted certiorari, 122 S. Ct. 663 (2001), and subsequently reversed, 122 S. Ct. 2005 (2002), remanding to the Fourth Circuit for "further proceedings consistent with [the Court's] opinion." Thus, the mere fact that Judge Michael agrees with the result in this case, in light of his express disagreement with the majority's blind reliance on *Milliken*, hardly renders the discrepancies between his concurring opinion and the majority a "distinction without a difference" and should not preclude this Court from granting certiorari.

IV. Allowing the Majority's Opinion to Stand Would Set a Dangerous Precedent for Fourth Circuit Law.

Certiorari is further warranted because the majority opinion, if allowed to stand, would set a dangerous precedent for Fourth Circuit law by allowing panels in that circuit to ignore state law – even when clearly articulated by state courts – in favor of so-called default rules established by federal

courts. Such a result would not only be contrary to this Court's holding in *Erie*, but it would also perpetuate precisely the circumstances that *Erie* sought to avoid: forum-shopping based on the disparity between South Carolina law as interpreted by federal courts – here, upholding the legal/equitable distinction in coverage disputes – on the one hand, and South Carolina law as set forth by South Carolina courts, which have rejected such a distinction, on the other hand.

Moreover, if the majority opinion is allowed to stand, this disparity between South Carolina law as interpreted by federal and state courts is likely to continue for some time, as federal courts will erroneously rely on it as an authoritative expression of South Carolina law rather than – as required by *Erie* – seeking to discern and apply state law on a case-by-case basis. *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1681-82 (1992) ("[S]ome evidence suggests that federal courts have shown a preference for citing federal decisions on state law instead of state decisions at rates approaching pre-*Erie* levels."). Indeed, to find an example of a federal court's reliance on federal decisions on state law, one need look no further than the district court opinion in petitioner's case, which makes no attempt to discern South Carolina law but instead relies solely on the Fourth Circuit's decision in *Milliken* to support its conclusion that "under [the Fourth Circuit's] interpretation of South Carolina law, *which the Court is bound to follow*, [respondents] do[] not have a duty to defend plaintiff in the four pending lawsuits because the relief sought . . . is equitable in nature and, therefore, does not constitute damages." Pet. App. 22a (emphasis in original). Further, not only does the district court opinion fail to mention state court cases such as *Braswell*, but it actually indicates – contrary even to respondents' concession that

Braswell is controlling law in the absence of a ruling from the Supreme Court of South Carolina, see BIO 8 n.2 – that it would not in fact regard a case such as *Braswell* as controlling, explaining that "[u]ntil such time (if ever) that the Fourth Circuit overrules [*Milliken*] (or there is some positive sign from the Supreme Court of South Carolina that [*Milliken*] incorrectly states the law), the Court will continue to apply the case as it has done here." Pet. App. 23a.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for a Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

Amy Howe
Goldstein & Howe, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016

Thornwell F. Sowell III
(Counsel of Record)
Sowell Gray Stepp & Laffitte
1310 Gadsden Street
Columbia, SC 29201
(803) 929-1400